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No. 14348

United States
Court of Appeals
for the Ninth Circuit

MARIO BALESTRERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9/10/54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 33192

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PALM, MARY PALM HARE, Alias MARY PALM; WILLIAM LEVIN, FRANK McKEE, Alias "BLACKIE"; IRVING WEXLER, Alias WAXEY GORDON; JOSEPH LITTMAN, CHARLES SCHIFFMAN, BARNEY GOLD, ROBERT L. REYNOLDS, JOSEPH OLIVERO, Alias JOE OLIVER; MARIO BALESTRERI, SEBASTIANO NANI, BETTY S. HAINES, PETER S. HAINES, EVAN W. ROGERS, MICHAEL DE PINTO, EDWARD SAHATI, WOODY ZAINE, SALVATORE TERRANO, Alias "TAR-BABY"; DONALD MEYER, GEORGE WILLIAMS, Alias HARRY WEIMER; JOHN R. PHELPS, and JOHN DURAND,

Defendants.

INDICTMENT

Violation: (Jones-Miller Act, 21 U.S.C. 174)—Concealment of Heroin—18 U.S.C. Section 371—Conspiracy.

First Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury charges: That Joseph Palm, defendant herein, on or about the 8th day of De-

cember, 1950, in the City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 211 grains of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Joseph Palm then and there knew.

Second Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That William Levin, defendant herein, on or about the 9th day of February, 1951, in the City of South San Francisco, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 7 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant William Levin then and there knew.

Third Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Frank McKee, alias "Blackie," defendant herein, on or about the 4th day of April, 1951, in the City of South San Francisco, County of San Mateo, State

and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 4 2/5 pounds of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Frank McKee, alias "Blackie," then and there knew.

Fourth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Irving Wexler, alias Waxey Gordon, defendant herein, on or about the 12th day of April, 1951, in the City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 5 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Irving Wexler, alias Waxey Gordon, then and there knew.

Fifth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Joseph Littman, defendant herein on or about the 8th day of January, 1951, in the City of Burlingame, County of San Mateo, State and Northern District of Cali-

fornia, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 2 1/2 pounds of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Joseph Littman then and there knew.

Sixth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Barney Gold, defendant herein, on or about the 22nd day of March, 1951, in the City of San Leandro, County of Alameda, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 2 1/5 pounds of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Barney Gold then and there knew.

Seventh Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Robert L. Reynolds, defendant herein, on or about the 19th day of February, 1951, in the City of Oakland, County of Alameda, State and Northern District of California, fraudulently and knowingly did conceal

and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 1 ounce of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Robert L. Reynolds then and there knew.

Eighth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Joseph Olivero, alias Joe Oliver, defendant herein, on or about the 20th day of January, 1951, in the City of Burlingame, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 2 1/2 pounds of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Joseph Olivero, alias Joe Oliver, then and there knew.

Ninth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Mario Balestreri, defendant herein, on or about the 23rd day of March, 1951, in the City of San Mateo, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a

certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 10 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Mario Balestreri then and there knew.

Tenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Sebastiano Nani, defendant herein, on or about the 10th day of February, 1951, in the City of San Jose, County of Santa Clara, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 5 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Sebastiano Nani then and there knew.

Eleventh Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Betty S. Haines, defendant herein, on or about the 16th day of March, 1951, in the City of Millbrae, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity

particularly described as one package containing approximately 10 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Betty S. Haines then and there knew.

Twelfth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Peter S. Haines, defendant herein, during the month of April, 1951, the exact date being to the Grand Jury unknown, in the City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 3 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Peter S. Haines then and there knew.

Thirteenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Evan W. Rogers, defendant herein, on or about the 11th day of February, 1951, in the City of Palo Alto, County of Santa Clara, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity

particularly described as one package containing approximately 17 1/2 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Evan W. Rogers then and there knew.

Fourteenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Evan W. Rogers, defendant herein, during the month of April, 1951, the exact date being to the Grand Jury unknown, in the City of Colma, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 2 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Evan W. Rogers then and there knew.

Fifteenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Michael De Pinto, defendant herein, on or about the 23rd day of February, 1951, in the City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation

of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 5 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Michael De Pinto then and there knew.

Sixteenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Michael De Pinto, defendant herein, on or about the 14th day of April, 1951, in the City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 5 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Michael De Pinto then and there knew.

Seventeenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Edward Sahati and Woody Zaine, defendants herein, on or about the 26th day of February, 1951, in the City of South San Francisco, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity

of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 5 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendants Edward Sahati and Woody Zaine then and there knew.

Eighteenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Salvatore Terrano, alias "Tar-Baby," defendant herein, on or about the 12th day of February, 1951, in the City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 5 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Salvatore Terrano, alias "Tar-Baby," then and there knew.

Nineteenth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Donald Meyer, defendant herein, on or about the 13th day of February, 1951, in the City of South San Francisco, County of San Mateo, State and Northern

District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 2 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Donald Meyer then and there knew.

Twentieth Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That Donald Meyer, defendant herein, during the month of April, 1951, the exact date being to the Grand Jury unknown, in the City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 2 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant Donald Meyer then and there knew.

Twenty-First Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That George Williams, alias Harry Weimer, defendant herein, on or about the 10th day of February, 1951, in the

City and County of San Francisco, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 5 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant George Williams, alias Harry Weimer, then and there knew.

Twenty-Second Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That John R. Phelps, defendant herein, on or about the 27th day of January, 1951, in the City of San Mateo, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 7 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant John R. Phelps then and there knew.

Twenty-Third Count: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: That John Durand, defendant herein, on or about the 17th

day of March, 1951, in the City of San Mateo, County of San Mateo, State and Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately 3 ounces of heroin, and the said heroin had been imported into the United States of America contrary to law, as the defendant John Durand then and there knew.

Twenty-Fourth Count: (Conspiracy, 18 U.S.C §371)

The Grand Jury further charges: That Joseph Palm, Mary Palm Hare, alias Mary Palm; William Levin, Frank McKee, alias "Blackie"; Irving Wexler, alias Waxey Gordon; Joseph Littman, Charles Schiffman, Barney Gold, Robert L. Reynolds, Joseph Olivero, alias Joe Oliver; Mario Balestreri, Sebastiano Nani, Betty S. Haines, Peter S. Haines, Evan W. Rogers, Michael De Pinto, Edward Sahati, Woody Zaine, Salvatore Terrano, alias "Tar-Baby"; Donald Meyer, George Williams, alias Harry Weimer; John R. Phelps and John Durand, defendants herein, at a time and place to said Grand Jury unknown, did conspire together and with Abraham Chalupowitz, alias Abe Chapman, Harry Winkelblack, alias Harry Wink, and Rose Mary Winkelblack, alias Rose Mary Wink, hereinafter named as co-conspirators but not as defendants herein, and with other persons whose names are

to said Grand Jury unknown, to sell, dispense and distribute not in or from the original stamped packages quantities of a derivative and preparation of morphine, to-wit, heroin, in violations of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of quantities of a derivative and preparation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as the said defendants, and each of them, then and there well knew, in violation of Section 174 of Title 21 United States Code; that thereafter and during the existence of said conspiracy one or more of the defendants, hereinafter mentioned by name, at the time and place hereinafter set forth, did the following acts in furtherance thereof and to effect the objects of the conspiracy aforesaid:

Overt Acts

1. During the month of August, 1950, the exact date being to the Grand Jury unknown, the coconspirator Abraham Chalupowitz, alias Abe Chapman, hereinafter referred to as Abraham Chalupowitz, the defendant Joseph Palm, and the defendant George Williams had a conversation within the premises of the Bay Meadows Club, 98 Eddy Street, San Francisco, California.

2. On or about February 23, 1951, the defendant Mary Palm Hare, alias Mary Palm, and the coconspirator Abraham Chalupowitz had a conversa-

tion in the presence of the co-conspirator Harry Winkelblack, alias Harry Wink, hereinafter referred to as Harry Winkelblack, in the vicinity of Bone's Corner, 186 Eddy Street, San Francisco, California.

3. On or about January 10, 1951, the defendant Joseph Palm, the co-conspirator Abraham Chalupowitz, and the co-conspirator Harry Winkelblack had a conversation in the vicinity of Bone's Corner, 186 Eddy Street, San Francisco, California.

4. During the month of January, 1951, the exact date being to the Grand Jury unknown, the co-conspirator Abraham Chalupowitz and the defendant William Levin had a conversation on 7th Street, between Market and Mission Streets, San Francisco, California.

5. On or about February 4, 1951, the defendant William Levin, the defendant Frank McKee, the co-conspirator Abraham Chalupowitz, and the co-conspirator Harry Winkelblack had a conversation in the vicinity of St. Vincent's Church, San Mateo, California, at which time the defendant William Levin received a package from the said co-conspirator Harry Winkelblack.

6. On or about February 9, 1951, the defendant William Levin, the defendant Frank McKee, the co-conspirator Abraham Chalupowitz and the co-conspirator Harry Winkelblack had a conversation in the vicinity of Oliver's Restaurant, 101 Lux Street, South San Francisco, California, at which

time the defendant William Levin received a package from the said co-conspirator Harry Winkelblack.

7. On or about February 11, 1951, the defendant William Levin, the defendant Frank McKee, the co-conspirator Abraham Chalupowitz and the co-conspirator Harry Winkelblack had a conversation in the vicinity of Oliver's Restaurant, 101 Lux Street, South San Francisco, California, at which time the defendant William Levin handed a package to the co-conspirator Harry Winkelblack.

8. On or about February 20, 1951, the defendant Frank McKee received a package from the co-conspirator Harry Winkelblack within the premises known as Kelley's Tavern, 19th and Irving Streets, San Francisco, California.

9. During the months of March, 1951, or April, 1951, the exact date being to the Grand Jury unknown, the co-conspirator Abraham Chalupowitz, the defendant Frank McKee and the defendant William Levin had a conversation within the premises of Uncle Tom's Cabin on El Camino Real, San Bruno, California.

10. On or about April 2, 1951, the co-conspirator Abraham Chalupowitz cashed a check for $2,000, within the premises of Uncle Tom's Cabin on El Camino Real, San Bruno, California.

11. On or about April 2, 1951, the defendant Frank McKee traveled by airplane from South San Francisco, California to New York, New York.

12. During the month of April, 1951 and some time after April 4, 1951, the exact date being to the Grand Jury unknown, the defendant William Levin transmitted by mail a sum of money to Irving Wexler, Brooklyn, New York.

13. On or about December 20, 1950, February 3, 1951, February 12, 1951, February 21, 1951, February 23, 1951 and April 7, 1951, the defendant Irving Wexler, alias Waxey Gordon, hereinafter referred to as Irving Wexler, from his home in Brooklyn, New York, conversed by telephone with the co-conspirator Abraham Chalupowitz in his home in San Mateo, California.

14. During the months of February, 1951 and March, 1951, the exact dates being to the Grand Jury unknown, the defendant Irving Wexler conversed by long-distance telephone with the co-conspirator Abraham Chalupowitz and the co-conspirator Harry Winkelblack in San Mateo County, California.

15. On or about January 4, 1951, the defendant Joseph Littman, in Paterson, New Jersey, received a letter which had heretofore been mailed to him by the co-conspirator Harry Winkelblack from San Mateo County, California.

16. On or about January 6, 1951, the defendant Joseph Littman caused to be mailed a package from Bronx, New York, to the co-conspirator Harry Winkelblack in Burlingame, California.

17. On or about January 18, 1951, the defendant Joseph Littman received in Paterson, New Jersey, a sum of money which had heretofore been mailed to him by the co-conspirator Harry Winkelblack in San Bruno, California.

18. On or about February 15, 1951, the defendant Joseph Littman, in Paterson, New Jersey, received a letter which had heretofore been mailed to him by the co-conspirator Harry Winkelblack in South San Francisco, California.

19. On or about February 21, 1951, the defendant Joseph Littman caused to be mailed a package from New York, New York to the co-conspirator Harry Winkelblack in Burlingame, California.

20. On or about February 26, 1951, the defendant Joseph Littman in Paterson, New Jersey, received a package which had heretofore been mailed to him by the co-conspirator Harry Winkelblack in San Mateo, California.

21. On or about March 18, 1951, the defendant Charles Schiffman spoke by long-distance telephone to the co-conspirator Harry Winkelblack in Belmont, California.

22. On or about March 20, 1951, the defendant Barney Gold caused to be transported by air-express a package from Chicago, Illinois, to San Leandro, California.

23. During the latter part of 1950, the exact date being to the Grand Jury unknown, the defendant

Robert L. Reynolds had a conversation with the co-conspirator Abraham Chalupowitz in the home of the said co-conspirator Abraham Chalupowitz in San Mateo, California.

24. On or about January 25, 1951, the defendant Robert L. Reynolds received a long-distance telephone call at St. Paul, Minnesota, from the co-conspirator Abraham Chalupowitz in San Mateo, California.

25. On or about February 10, 1951, the defendant Robert L. Reynolds received a long-distance telephone call at St. Paul, Minnesota, from the co-conspirator Abraham Chalupowitz in San Mateo, California.

26. On or about February 15, 1951, the defendant Robert L. Reynolds sent a package from Minneapolis, Minnesota, to the co-conspirator Harry Winkelblack, which package was received by the co-conspirator Harry Winkelblack on or about February 19, 1951, at Oakland, California.

27. On or about January 15, 1951, the co-conspirator Harry Winkelblack addressed a letter to the defendant Joseph Olivero in Kansas City, Missouri.

28. On or about January 17, 1951, the defendant Joseph Olivero in Kansas City, Missouri, conversed by long-distance telephone with the defendant Mario Balestreri in San Jose, California.

29. On or about January 17, 1951, the defendant Joseph Olivero mailed a package from Kansas City,

Missouri, to the co-conspirator Harry Winkelblack, which package was received by the co-conspirator Harry Winkelblack on or about January 20, 1951, at Burlingame, California.

30. On or about February 22, 1951, the co-conspirator Abraham Chalupowitz and the co-conspirator Harry Winkelblack drove to the outskirts of Redwood City, California, for a meeting with the defendant Mario Balestreri.

31. On or about February 22, 1951, the defendant Mario Balestreri delivered a package to the co-conspirator Abraham Chalupowitz on Bay Shore Highway, on the outskirts of Redwood City, California.

32. On or about February 10, 1951, the co-conspirator Abraham Chalupowitz and the co-conspirator Harry Winkelblack drove in an automobile to the vicinity of 1577 McKendrie Street, San Jose, California.

33. On or about February 10, 1951, the defendant Sebastiano Nani delivered a package to the co-conspirator Abraham Chalupowitz within the premises at 1577 McKendrie Street, San Jose, California.

34. On or about February 10, 1951, the defendant Sebastiano Nani and the co-conspirator Abraham Chalupowitz placed a carton in an automobile parked in the vicinity of 1577 McKendrie Street, San Jose, California.

35. During the month of December, 1950, and during the months of January, February and

March, 1951, the exact dates being to the Grand Jury unknown, the co-conspirator Abraham Chalupowitz and the co-conspirator Harry Winkelblack drove in an automobile to the vicinity of 197 Cook Street, San Francisco, California.

36. During the month of December, 1950, and during the months of January, February and March, 1951, the exact dates being to the Grand Jury unknown, the co-conspirator Abraham Chalupowitz entered the premises at 197 Cook Street, San Francisco, California, carrying on each occasion a package.

37. During the month of April, 1951, the exact date being to the Grand Jury unknown, the defendant Peter Haines received a package from the defendant William Levin in the vicinity of 197 Cook Street, San Francisco, California.

38. On or about February 23, 1951, the defendant Betty S. Haines received a package from the co-conspirator Harry Winkelblack, in the presence of the co-conspirator Abraham Chalupowitz, in the vicinity of Smith's Drive-In on El Camino Real, Millbrae, California.

39. On or about March 16, 1951, the defendant Betty S. Haines received a package from the co-conspirator Harry Winkelblack in the vicinity of Smith's Drive-In on El Camino Real, Millbrae, California.

40. On or about January 3, 1951, the defendant Evan W. Rogers received a package from the co-

conspirator Abraham Chalupowitz in the vicinity of 1131-13th Avenue, Oakland, California.

41. On or about February 19, 1951, the defendant Evan W. Rogers, the co-conspirator Abraham Chalupowitz, and the co-conspirator Harry Winkelblack had a conversation in the vicinity of Greenville Road, Livermore, California.

42. During the month of April, 1951, the exact date being to the Grand Jury unknown, the defendant Evan W. Rogers received a package from the defendant William Levin in Colma, San Mateo County, California.

43. On or about January 21, 1951, the defendant Michael DePinto received a package from the co-conspirator Abraham Chalupowitz in the vicinity of Oliver's Restaurant, 101 Lux Street, South San Francisco, California.

44. On or about February 22, 1951, the defendant Michael DePinto traveled from Portland, Oregon to San Francisco, California.

45. On or about February 23, 1951, the defendant Michael DePinto received a package from the co-conspirator Harry Winkelblack in the vicinity of the Governor Hotel, San Francisco, California.

46. On or about March 17, 1951, the defendant Michael DePinto, the co-conspirator Abraham Chalupowitz, and the co-conspirator Harry Winkelblack had a conversation within the premises of the Governor Hotel, San Francisco, California.

47. During the month of April, 1951, the exact date being to the Grand Jury unknown, the defendant Michael DePinto received a package from the defendant William Levin within the premises of the Governor Hotel, San Francisco, California.

48. On or about January 30, 1951, the defendant Edward Sahati, the defendant Woody Zaine, and the co-conspirator Harry Winkelblack had a conversation in the Mapes Hotel, Reno, Nevada.

49. On or about February 13, 1951, the defendant Edward Sahati gave a sum of money to the co-conspirator Harry Winkelblack in or near the Mapes Hotel, Reno, Nevada.

50. On or about February 26, 1951, the defendant Woody Zaine received a package from the co-conspirator Harry Winkelblack in the vicinity of the San Francisco Airport, South San Francisco, California.

51. On or about March 16, 1951, the defendant Woody Zaine and the co-conspirator Harry Winkelblack had a conversation in the Mapes Hotel, Reno, Nevada.

52. On or about March 16, 1951, the defendant Edward Sahati and the co-conspirator Harry Winkelblack had a conversation at the Colony Club, Reno, Nevada.

53. On or about February 2, 1951, on or about February 12, 1951, on or about March 14, 1951, and on divers others days during the months of February

and March, 1951, the exact dates being to the Grand Jury unknown, the defendant Salvatore Terrano, alias "Tar-Baby," hereinafter referred to as Salvatore Terrano, received, on each occasion, a package from the co-conspirator Harry Winkelblack, in the presence of the co-conspirator Abraham Chalupowitz, while within the premises of the Twin States Novelty Store, 1033 Mission Street, San Francisco, California.

54. On or about March 2, 1951, the defendant Salvatore Terrano handed a sum of money to the co-conspirator Harry Winkelblack within the premises of the Twin States Novelty Store, 1033 Mission Street, San Francisco, California.

55. On or about March 3, 1951, the defendant Salvatore Terrano handed a sum of money to the co-conspirator Harry Winkelblack within the premises of the Twin States Novelty Store, 1033 Mission Street, San Francisco, California.

56. On or about January 16, 1951, the defendant Donald Meyer, the co-conspirator Abraham Chalupowitz, and the co-conspirator Harry Winkelblack had a conversation within the premises known as Oliver's Restaurant, 101 Lux Street, South San Francisco, California, at which time the defendant Donald Meyer handed a sum of money to the co-conspirator Abraham Chalupowitz.

57. On or about February 13, 1951, the defendant Donald Meyer received a package from the co-conspirator Harry Winkelblack near Bay Shore High-

way, on the outskirts of South San Franciso, California.

58. On or about March 15, 1951, the defendant Donald Meyer received a package from the co-conspirator Harry Winkelblack in the vicinity of Smith's Drive-In on El Camino Real, Millbrae, California.

59. On or about March 16, 1951, the defendant Donald Meyer received a package from the co-conspirator Harry Winkelblack in the vicinity of Smith's Drive-In on El Camino Real, Millbrae, California.

60. During the month of April, 1951, on two separate occasions, the defendant Donald Meyer received a package from the defendant William Levin in San Francisco, California, the exact dates and places being to the Grand Jury unknown.

61. On or about February 10, 1951, the co-conspirator Abraham Chalupowitz, the defendant George Williams, and the co-conspirator Harry Winkelblack had a conversation within the premises known as Kelley's Tavern, 19th and Irving Streets, San Francisco, California.

62. On or about February 10, 1951, in the vicinity of the Shriners' Hospital for Crippled Children, San Francisco, California, in the presence of the co-conspirator Abraham Chalupowitz, the defendant George Williams received a package from the co-conspirator Harry Winkelblack.

63. On or about March 3, 1951, the defendant George Williams gave the co-conspirator Harry Winkelblack a sum of money within the premises of Kelley's Tavern, 19th and Irving Streets, San Francisco, California.

64. On or about March 13, 1951, the defendant George Williams received a package from the co-conspirator Harry Winkelblack while driving in an automobile in the vicinity of Kelley's Tavern, 19th and Irving Streets, San Francisco, California, at which time the defendant George Williams handed to the co-conspirator Harry Winkelblack a sum of money.

65. On or about February 12, 1951, the defendant John R. Phelps received a package from the co-conspirator Harry Winkelblack in the vicinity of the Benjamin Franklin Hotel, San Mateo, California.

66. On or about March 16, 1951, the defendant John R. Phelps, the co-conspirator Abraham Chalupowitz, and the co-conspirator Harry Winkelblack had a conversation in the vicinity of the Benjamin Franklin Hotel, San Mateo, California.

67. On or about February 17, 1951, the defendant John Durand, the co-conspirator Abraham Chalupowitz and the co-conspirator Harry Winkelblack had a conversation within the premises of the Benjamin Franklin Hotel, San Mateo, California.

68. On or about March 16, 1951, the defendant John Durand traveled from Phoenix, Arizona, to South San Francisco, California.

69. On or about March 17, 1951, the defendant John Durand received a package from the co-conspirator Harry Winkelblack within the premises of the Benjamin Franklin Hotel, San Mateo, California.

A True Bill.

/s/ SIDNEY H. KESSLER,
Foreman.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

Approved as to Form:

/s/ J. K.

Penalty: Counts 1 through 23: Imprisonment for not more than 10 years and fine of not more than $5,000.00, on each count.
Count 24: Imprisonment for not more than 5 years or fine of not more than $10,000.00, or both.

Bail, $10,000.00 for each defendant.

/s/ LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Filed March 7, 1952.

United States District Court for the Northern District of California, Southern Division

No. 33192

UNITED STATES OF AMERICA,

vs.

MARIO BALESTRERI.

JUDGMENT AND COMMITMENT

On this 4th day of September, 1953, came the attorney for the government, and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of violation of Jones-Miller Act, 21 U.S.C. 174—(Defendant, Mario Balestreri on or about March 23, 1951, at San Mateo, California, fraudulently and knowingly did conceal and facilitate the concealment and transportation of a lot of heroin, one package containing approximately 10 ounces of heroin, and said heroin had been imported into United States of America contrary to law, as said defendant then and there knew) as charged in Count 9; and of violation of Title 18, United States Code, Section 371—Conspiracy to violate §§2553 and 2557, 26 USC (sale of morphine), and §174, 21 USC (Concealment and transportation of heroin which had been imported into the United States of America contrary to law), (On or about February 22, 1951, defendant Mario Balestreri, on Bay Shore Highway, on the outskirts of Redwood

City, Calif., did a certain overt act in furtherance of said conspiracy and to effect the objects thereof), as charged in Count 24 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years and pay a fine of One Dollar ($1.00) on Count 9; Three (3) Years on Count 24.

Ordered that said sentences of imprisonment commence and run Concurrently.

(Indictment contains 24 counts. Defendant not named in remaining counts.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge.

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Filed September 4, 1953.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The defendant, Mario Balestreri, moves the court to grant him a new trial for the following reasons:

That since the verdict and judgment in the above-entitled case against the defendant newly discovered evidence shows that the defendant, Mario Balestreri, was substantially prejudiced and deprived of a fair trial; that such prejudice resulted from the fact that the sole witness against the defendant, Harry Winkelblack, while testifying as a government witness, was testifying under threats, duress and promises made against him and to him by Agents of the Government, and testified falsely against said defendant.

The evidence showing the bias and prejudice of this witness against the defendant herein could not have been discovered with due diligence at or before the time of trial, and has just been discovered and could not have been discovered prior to the verdict and judgment in the case and by the exercise of due diligence.

This motion is based upon all the files and records in the above-entitled proceeding and upon the Affidavit of James E. Burns attached hereto and the Exhibits attached to said Affidavit.

Wherefore, defendant prays that this Court grant

said motion for a new trial and afford such other relief as may be appropriate.

/s/ JAMES E. BURNS,
Attorney for Defendant,
Mario Balestreri.

Receipt of copy acknowledged.

[Endorsed]: Filed March 11, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR A NEW TRIAL

State of California,
City and County of San Francisco—ss.

James E. Burns, being first duly sworn, deposes and says:

That he is the attorney for the defendant, Mario Balestreri, in the above-entitled proceeding; that said Mario Balestreri was charged with offenses against the Narcotic Laws of the United States in the indictment herein and after a trial by jury was convicted and thereafter sentenced. The only witness testifying against the defendant, Mario Balestreri, was one Harry Winkelblack, who testified on behalf of the Government. In substance said witness testified as to several meetings between defendant, Mario Balestreri, and the co-defendant Abraham Chalupowitz, also known as Abe Chapman, at vari-

ous times and at various places in the Counties of Santa Clara and San Mateo. These meetings were denied by the defendant who took the stand on his own behalf and were likewise denied by the co-defendant, Abe Chapman, who prior to the time of his testimony had pled guilty in the charges against him contained in said indictment.

Since the above-mentioned trial, verdict and sentence affiant has come into possession of certain documents and copies of the same are attached hereto marked respectively Exhibits "A" and "B," and by this reference are incorporated herein. Affiant is informed and believes and upon such information and belief alleges that the copies of said documents attached hereto are true, genuine and authentic copies of the originals of said documents. The document marked Exhibit "A" is a copy of a letter from Roy Casey, Inspector, U. S. Bureau of Prisons, addressed to Frank Loveland, an official of said Bureau of Prisons in Washington, D. C., dated May 18, 1952. The document hereto attached marked Exhibit "B" is a copy of a teletype message from said Roy Casey, Inspector, Bureau of Prisons, addressed to M. E. Alexander, Assistant Director, Bureau of Prisons, dated May 20, 1952.

Said Exhibit "A" shows that Harry Winkelblack, the only witness on behalf of the Government, in testifying against the defendant, Mario Balestreri, was testifying under duress, promises and threats, and that his testimony was biased and prejudiced against the defendant and was knowingly induced

by the various agents of the Narcotic Bureau and the Assistant United States Attorney who procured the indictment herein and instigated the prosecution against this moving defendant. Affiant, as attorney for the defendant, Mario Balestreri, was unable to prove at the trial of this case the bias and prejudice of said witness or the threats and promises made against him or to him prior to the time said witness testified, or to establish at the time of said trial by competent evidence that said witness was testifying under compulsion and that his testimony was induced by the various threats, promises, favors and treatment all as more particularly described in said Exhibit "A." The defendant testified at said trial as to his whereabouts at the particular times and places as testified to by prosecution witness and stated in substance that he was not present at the times or at the places so testified to as to the prosecution witness, and he was corroborated in said testimony by two disinterested witnesses who testified as to his presence at places different from those testified to by the witness, Harry Winkelblack. The defendant, in taking the stand on his own behalf, had testified as to prior criminal convictions. Affiant as attorney for said defendant was unable to show at the time of said trial because such evidence was not available and could not be discovered with due diligence, that the witness Harry Winkelblack, who is named as a co-conspirator but not as a defendant, was a biased, prejudiced, untruthful and false witness against the defendant and that his testimony against the

defendant had been procured and induced by agents of the Narcotic Bureau and the Assistant United States Attorney in and for the above-named district, by threats, promises, and favors as set forth in the Exhibits hereto attached. Had affiant been able, as counsel for said defendant, to prove and show the threats, promises and favors given and made to said witness for the Government, affiant would have established that said witness was biased, prejudiced and testified falsely against said defendant, and that said testimony of said witness was known to be false by said agents of the Government, and the credibility of said witness would have been destroyed.

Wherefore, affiant prays that said defendant be afforded a new trial on the ground of newly discovered evidence as herein set forth.

/s/ JAMES E. BURNS.

Subscribed and sworn to before me this 11th day of March, 1954.

[Seal] /s/ PHYLLIS KNORR,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

(Copy)

San Francisco, Calif.,
May 18, 1952.

Air Mail

Mr. Frank Loveland,
Bureau of Prisons,
Washington, D. C.

Dear Frank:

When Alex called me last Wednesday morning at San Bernardino by long distance he instructed me to return to San Francisco immediately to make further inquiry into the matter of detention of federal prisoner Harry Winkelblack and to report to you since both he and Mr. Bennett would be away from Washington for several days. I am therefore giving you this report and will try to make it as short, yet explicit, as possible. I have run into some things and some angles of the matter which I only suspected before but which I know have full proof of, and they are very serious.

When I arrived in San Francisco about 2 p.m., on Thursday, I went directly to the Marshal's office but found that he was out of town and would not return until tomorrow, May 19, but I conferred with his Chief Deputy. I also got in touch with Mr. Joe Karesh, the Assistant U. S. Attorney, who is in charge of prosecution of the narcotic cases in which Winkelblack is mixed up. Mr. Karesh arranged for

a conference with Narcotic Agents Gentry and Craig, who are handling the case, and this was held Friday morning in Mr. Karesh's office with the two Agents, Mr. Karesh and myself being present.

Mr. Karesh has made a full report to the Attorney General, it seems, concerning the place and kind of detention treatment he and the Narcotic Agents believe Winkelblack must receive if he is to continue to co-operate with them in giving the kind of testimony and evidence they will have to present to the jury when the case comes to trial. Mr. Karesh strongly insists that Winkelblack is the key witness in the case and if he balks or turns out to be a non-cooperating witness on the stand, their case is lost. He further insists that Winkelblack will be just such a witness if anything is done to tighten up on the custody under which he is being held and if any of his special privileges now being allowed are taken from him. Both Mr. Gentry and Mr. Craig, the Narcotic Agents, concur in this belief and they are demanding that nothing be done to disturb or irritate Winkelblack. They asked that I pass this belief of theirs on to Mr. Bennett and to make it plain that they believe if Winkelblack's trusty and other undue privileges are taken from him and he is kept in maximum security quarters along with other jail inmates of his type and status, successful prosecution of the case will be so jeopardized that it might as well be dropped right now. In fact, Mr. Karesh went so far as to say that he would favor stopping right now if the Bureau does a thing that

will disturb Winkelblack's contented attitude, call off the prosecution and then give full statement to the newspapers as to the reason and place all the blame on the Bureau of Prisons. Mr. Gentry said that he would favor, in that event, taking the whole matter before the federal grand jury for an investigation. So you see how strongly they feel in the matter. I told them that I'd make no recommendations to the Bureau until I went back to the Contra Costa County Jail to make some further investigation into the situation. This I did yesterday and here are the facts as I found them.

When I arrived at the jail shortly before noon I found that the Chief Jailer was off duty always on Saturdays and Sundays, also that the Sheriff was never in town on the week end. I went directly to the prisoner intake entrance of the jail which is thru an open-front garage and into a sort of sally-port into a ground level basement. This sally-port has two security doors but one of which is only kept locked—these doors are key locked only and the officer on duty just inside the inner door carries keys to both doors dangling from a shallow pocket on the side of his trousers. I had never met this particular officer before, but when I told him who I was, he immediately opened the first door and let me in, but never asked for my credentials, nor did he ask if I had a gun until about fifteen minutes later when we went farther into the jail. It was at this first contact with the guard that I learned about both the Sheriff and Chief Jailer being off duty.

This officer was a young man and appeared to be very intelligent and courteous, but lacking in caution by allowing a total stranger into the jail in such a way as to make it easily possible to release Winkelblack, along with all other prisoners in the basement quarters of the jail, or to kill him and make a successful get-away. At the insistence of Mr. Karesh and the Narcotic Agents, Winkelblack is given these basement trusty privileges, along with others not allowed the jail's other seven trusties which will be mentioned further down in this report.

After talking with the guard for some minutes concerning general matters and the duties and privileges allowed Winkelblack, I asked where Winkelblack was. Said that I'd like to see and talk with him and to check on his quarters. I was told that he was then in the jail's holdover dormitory, into which all newly arrived prisoners are kept until they can be processed into the jail, where another inmate was cutting his hair. Then I asked to be taken to Winkelblack's quarters to look them over while his barber work was being finished. The officer and I then walked down the main basement hallway to the storeroom and clothes room where Winkelblack has a bed. The guard discovered that the door to this room was locked and he said that he had no key to it, so would have to get Winkelblack's key—the only one he, the guard, knew anything about and which Winkelblack kept in his possession all the time, both day and night. It was brought out then that the prisoner was never locked in his quarters, that he

had access to the entire basement quarters from which only one locked door kept him from outside freedom, that he often was given work to do on the upper floors and to the jail roof where he could go for sun and outdoor air. It appears that he has many duties to perform as trusty in charge of jail uniforms, inmates' clothes, issuing of towels and other supplies, doing minor repair jobs and replacing electric light bulbs, etc., and has many uncontrolled opportunities for irregularities and connivance. I found in his quarters a pair of scissors which he is allowed to keep at all times, two screwdrivers, and any number of articles which could be easily converted into tools or weapons, and his freedom is so unhampered that he has unlimited opportunities to assault or over power the one guard posted in the jail basement, lock him in a cell or in the sally-port and escape with all the guard's keys, and immediately outside a number of automobiles are always parked. He could easily get a gun into the jail and possibly without much difficulty could force his way into the main jail office on the floor above where prisoners' cash is kept in an easily opened drawer sometimes to the amount of two thousand dollars or more. In addition to these bad custodial practices with a prisoner who has done time in Joliet, Leavenworth and San Quentin (where he is now under a sentence up to 20 years), and is now mixed up in what Mr. Karesh and Mr. Gentry insist on calling the biggest narcotic case the Government has ever had, Winkelblack is given

the privilege of visiting with his wife every Sunday in strict privacy of the jail's consultation room for several hours at a time and without adequate precautions against contraband being taken. It should be added, however, that his conduct is said to be without suspicion since being in the Contra Costa County Jail, and all jail officials, especially the Sheriff, who happens not to have seen Winkelblack in several weeks (according to Winkelblack's statement), also the Assistant U. S. Attorney, Mr. Karesh and the Narcotic Agents, say they have the utmost confidence in the prisoner and have no fear whatsoever that he will make an effort to escape nor that he can or will be gotten to from the outside by either his friends or his enemies in the narcotic ring who are said to be numerous and desperate.

On my previous visits to the Contra Costa County Jail where Winkelblack is now being kept, and to my visit to the Solano County Jail at Fairfield, Calif., where he was formerly kept and from which he had to be moved because of gross irregularities and laxity, I avoided talking with him because the officials who are handling the big narcotic case were very desirous that nothing be done to disturb Winkelblack and put a fear in his mind that might cause him to go back on his promises to them and fail to come thru with his vital testimony. But at this time I am of the opinion that too much is involved from the Bureau's standpoint and responsibility, consequently I had a long and very frank talk with him in an effort to get information and details about

which I have previously had only second hand reports and misinformation. My talk with the prisoner was without any tension whatsoever and I found him very frank and open in answering my questions and in giving me most of the information that I sought. Altho he appeared to be truthful he did evade the answers to some questions but, on the whole, I got from him the full story of his stay in the Solano County Jail, and of his escapes from it.

He was committed there sometime last August, I believe, and shortly thereafter was brought before the federal grand jury in San Francisco about three or four days each week. In order to make a more contented and tractable witness out of him, the U. S. Attorney's office and the Narcotic Agents asked the jail officials to make a trusty of Winkelblack and to give him some work to do to keep him busy and to afford him some special privileges. Winkelblack seems to have made an excellent records clerk for the jail and soon became almost a member of the jail staff. He worked in the jail and sheriff's offices, which are outside the locked portion of the jail, he was permitted to go down into town on any occasions he wished to and before very long his freedom and privileges were not controlled in the least.

During my long talk with Winkelblack yesterday he told the following account of his activities in the Solano County Jail. By the time he had been there for five or six weeks, his pattern of activities was pretty well established both as to his duties and freedom in and out of the jail and as to his appear-

ance before the grand jury which generally took place from Mondays to Wednesdays or Thursdays. When he was established so securely with both the federal officers and the jail officials and with the knowledge and consent of the sheriff and head jailer, and possibly others whom he refused to name to me, he made the most of the opportunity to get out of the jail and for nearly every week end from October to just before the Christmas holidays he left the jail and spent the time with his wife over in Berkeley, about 25 miles away. His freedom to make these week-end excursions to his wife's apartment went along unrestricted until December 21, I believe it was, when one of the deputy sheriffs who was not in on the matter happened to be assigned to jail duty and made the discovery about 8 o'clock that morning that Winkelblack was out of jail. When Sheriff Joyce was informed of his absence he knew, of course, just where to find Winkelblack so he phoned him at his wife's apartment in Berkeley to return to jail immediately and told him that his "inexperienced deputy" had put out an alarm about his escape from the jail and that there was nothing for him to do but to return immediately. Winkelblack stated to me that it was his intention to stay out of jail and at his wife's apartment over the week end and Xmas holidays and that the Sheriff, and possibly others, had given their consent to this, but the dumb deputy sheriff broke up the plan. Winkelblack stated to me that he thought, since the alarm of his escape had gone out over the police radio, it would be the best to phone Federal

Narcotic Agent Craig and have him come over to Berkeley and pick him up and take him back to the jail, and this he did. Winkelblack claims that the occasion just mentioned was the last time he escaped from the jail, and he stated that he has never been outside of the Contra Costa County jail where he is now confined. On the other hand, he did make some statements which have considerable bearing on his attitudes and incentive to escape.

He stated that when he was first brought from San Quentin and placed in the Solano County Jail as a federal prisoner he was terribly wrought up over his young wife and the place where she was staying in Berkeley. He said that if he had not gone out for those week-end visits to her and got her moved to another apartment he would have "lost her like I did my first wife when I went off to prison." He said she first had a room in an apartment house in which was another man who was becoming interested in her and she in him and possibly the only thing that stopped a breakup of their marriage was his finding another place for her to live and his week-end visits to her. When I asked him if there was not any uneasiness in his mind, since he gets out to see her no longer, he assured me that there isn't. He added that his Sunday visits with her in the privacy of the Contra Costa County jail's consultation room takes care of everything now. He hastened to add that if he lost such privilege now and had to be confined in jail under less favorable circumstances, he would just ask to be

taken back to San Quentin and refuse to go on with his testimony as a Government witness. While not at all discourteous he was very frank and positive in his statement that either his present situation had to remain undisturbed so far as place of confinement and privileges are concerned or he would back out on all his promises and testimony, and demand to be returned to San Quentin to continue his time there.

This attitude confirms the fears of Mr. Karesh and the Narcotic Agents, of course, but when I presented another angle to the matter Winkelblack had not thought of, he weakened some. I asked him if he'd ever considered the possibility of his being prosecuted by the Government for escaping jail, and probably on many counts, and also of his wife being involved as harboring an escaped federal prisoner. He said he hadn't and he showed some fear at the thought, but he hastened to say that he didn't think Mr. Karesh would do that to him. I told him that I did not know, of course, what could or would happen in the event he got stubborn, but at least there was something to think about. In fact, I am now so sure that this idea of federal prosecution on escape from jail has so changed his mind, that Mr. Karesh need have no fear whatsoever of his backing down on his testimony. Also Winkelblack seems to be sincerely in love and devoted to his wife and he would do nothing that would endanger her in the least.

Altho Winkelblack appears frank, friendly and truthful and sincere in his assurances that he has learned his lesson and lives only for the day when he can get his freedom and return to his wife and baby, he dropped another disturbing thought which the Bureau should not pass over without giving it full consideration in making decisions concerning him and his place of confinement, also his prosecution on the jail escapes.

In my letter of April 21 to Mr. Alexander, I sent along a newspaper clipping and made mention of the fact that Winkelblack had been approached with the idea of writing his life's story and an account of his breaking this "big narcotic case." I questioned him yesterday concerning this matter and what he said is or might be very alarming. He disclaimed to me any intention of publicizing his story but he did mention the possibility of such a story as being more sensational than the one which came out in the Saturday Evening Post a few weeks ago by the ex-convict who caused Waxey Gordon's downfall. Waxey Gordon, as you know, is mixed up in the Winkelblack case and an account of what happens in it would only be a sequel to the Saturday Evening Post story—so Winkelblack stated. To make it more sensational, he very boldly said, "I could put in all the details of how, as a federal prisoner, I had the privilege of leaving jail to spend the week ends with my wife!"

EXHIBIT "B"

(Copy)

San Francisco—May 20, 1952

Mr. M. E. Alexander,
Assistant Director,
Bureau of Prisons,
Washington, D. C.

Teletype Message Via Alcatraz—10:30 A.M.

Assistant U. S. Attorney Karesh still blocking confinement of Winkelblack in quarters adequately secure against escape and is demanding that his special privileges be continued. He is also insisting that I remain in San Francisco until the matter is definitely settled to his satisfaction. My work here is completed and my report was airmailed to you on May 18. It sums up the situation as I see it. I am anxious to get on to my other work but have promised Mr. Karesh that I'd delay leaving until tomorrow in order to give you time either to approve or disapprove my recommendation for more strict custody to be maintained over Winkelblack. Please let me know your decision as soon as possible.

ROY CASEY,
Inspector.

Receipt of copy acknowledged.

[Endorsed]: Filed March 11, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Balestreri moves for a new trial, (Rule 33 F.R.C.P.), upon the ground that he has newly discovered evidence that the witness Harry Winkelblack testified falsely as a government witness against him, because he gave his evidence "under threats, duress and promises made against him and to him by agents of the government." The motion is supported by an affidavit of James E. Burns, the attorney who represented Balestreri at the trial. The affidavit alleges that, upon the basis of a letter, which in some unexplained manner, came into the possession of the affiant, written by a federal prison inspector to an official of the Federal Bureau of Prisons, the witness Harry Winkelblack, testified "under duress, promises and threats and his testimony was biased and prejudiced against the defendant and was knowingly induced by the various agents of the Narcotics Bureau and the Assistant United States Attorney who procured the indictment herein and instigated the prosecution against this moving defendant," by "threats, promises and favors." The prison inspector's letter, referred to, was dated May 18, 1952 and is in the nature of a report as to the conditions surrounding the imprisonment of the witness Winkelblack in the Contra Costa jail, Contra Costa County, California. The inspector, in great detail, sets forth the facts showing that proper security safeguards were not

maintained with respect to the prisoner Winkelblack and that he was allowed unusual freedom while in the jail.

The witness Winkelblack, at the time the federal grand jury was investigating the charges against the defendants in this action, was an inmate of the State Penitentiary at San Quentin, serving a sentence imposed by the State Court. For the purpose of obtaining the testimony of the witness Winkelblack before the federal grand jury, this court issued a writ of habeas corpus ad testificandum. Pursuant to the writ, the United States Marshal brought the witness from the state prison and lodged him in the Contra Costa County jail to make him available as a witness before the federal grand jury. Since the affidavit of James E. Burns is not contraverted, the court must assume and accept as correct the allegations that Winkelblack was given favored treatment and that security regulations were relaxed in his case. Winkelblack was named as a co-conspirator, but not as a defendant, in the indictment subsequently found. He testified before the grand jury several times.

After giving his testimony before the grand jury, and on June 17, 1953, the writ of habeas corpus was discharged and Winkelblack was returned to the state prison at San Quentin. Thereafter, and several months prior to Balestreri's trial, Winkelblack was released on parole from San Quentin prison by the state authorities.

Neither the affidavit, nor the exhibits, thereto substantiate in any way, Balestreri's assertion that Winkelblack's testimony at his trial was given as a result of any promises or threats upon the part of any government agent or that the so-called favorable treatment given him, while in the Contra Costa County jail, had any proximate relationship to his testimony later given at Balestreri's trial.

Moreover, even if true and reasonably related to his testimony, these facts would be no more than in the nature of impeachment. Hence they do not have the substance which would invoke the exercise of judicial discretion on motion for a new trial. Gage v. U.S. 9 Cir. (1948) 167 F.2d 122; McDonnell v. U.S. D.C.C. (1946) 155 F.2d 297; Thompson v. U.S. D.C.C. (1950) 188 F.2d 652; Martin v. U.S. 6 Cir. (1946) 154 F.2d 269.

The motion for a new trial is denied.

Dated March 19, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed March 19, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Mario Balestreri, Rt. 2, Box 605, Santa Clara, California.

James E. Burns, 111 Sutter Street, San Francisco, California.

Violation: Ninth Count—Jones Miller Act, 21 U.S.C. 174; Twenty-fourth Count—Conspiracy Act, 18 U.S.C. 371.

Judgment: Ninth Count—Three years; Twenty-fourth Count—Three years. Concurrent.

Order Denying Motion for a New Trial on ground of newly discovered evidence March 19, 1954.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit in the above-stated order denying appellant's motion for a new trial on the ground of newly discovered evidence dated March 19, 1954, which motion was made within two years after the judgments of conviction above noted.

Dated: March 26, 1954.

/s/ JAMES E. BURNS,
Attorney for Defendant.

[Endorsed]: Filed March 26, 1954.

The United States District Court, Northern District of California, Southern Division

No. 33192

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARIO BALESTRERI and JOSEPH LITTMAN,

Defendants.

REPORTER'S TRANSCRIPT

August 17, 18, 19 and 20.

Before: Hon. Louis E. Goodman, Judge.

Appearances:

For the Government:

LLOYD H. BURKE, ESQ.,
United States Attorney, by
JOHN RIORDAN, ESQ., and
RICHARD FOSTER, ESQ.,
Asst. U. S. Attorneys.

For the Defendants:

JAMES E. BURNS, ESQ.

Monday, August 17, 1953—10:00 O'clock A.M.

The Clerk: United States versus Mario Balestreri and Joseph Littman, jury trial.

Mr. Riordan: The United States is ready.

Mr. Burns: Ready.

(Whereupon a jury was selected and sworn.)

Tuesday, August 18, 1953—10:00 o'Clock A.M.

HARRY WINKELBLACK

a witness called on behalf of the Government, being first duly sworn to tell the truth the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court and jury.

A. Harry Winkelblack.

Direct Examination

By Mr. Riordan:

Q. Mr. Winkelblack, where do you reside?

A. In Berkeley.

Q. California? A. Yes, sir.

Q. You are named in this indictment as a co-conspirator, is that correct? [3*] A. Yes.

Q. Have you used other names?

A. Yes, sir. I used the name Wink and Paul Adams and Al Green.

Q. And have you had prior convictions and jail sentences? A. Yes, sir.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Harry Winkelblack.)

Q. What was the date of your first conviction?

A. January, 1942.

Q. And what was that for?

A. That was for burglary in Illinois.

Q. Burglary in Illinois. Did you serve a jail sentence for that?

A. I served a penitentiary sentence.

Q. How long did you serve?

A. I was released in approximately two years and then was tried by the federal authorities in 1944 on a mail theft charge. I was sentenced to Leavenworth in October, 1944.

Q. Were you arrested by the California Narcotic authorities for narcotic violations?

A. Yes, sir.

Q. Where were you arrested?

A. At San Leandro, California, on March 23rd, 1951.

Q. Did you receive a sentence from the Alameda County Superior Court for that arrest?

A. Yes, sir. [4]

Q. What was the arrest for?

A. Transportation of narcotics.

Q. And what was your sentence by the Alameda County Superior Court? A. One to ten.

Q. And the date of that arrest was what?

A. March 23rd, 1951.

Q. At San Leandro, California?

A. Right.

Q. Now, were you also sentenced by the San Mateo County Superior Court? A. Yes, sir.

(Testimony of Harry Winkelblack.)

Q. And the alleged date of the offense of that sentence was what? A. March 23rd.

Q. The same date as the San Leandro?

A. Yes, sir.

Q. And what was the charge for?

A. Possession of narcotics in my residence.

Q. Possession of narcotics in your residence?

A. Yes.

Q. And your residence at that time was——

A. Burlingame, California.

Q. What sentence did you receive from the Superior Court of San Mateo County? [5]

A. Another one to ten consecutive to the one to ten from Alameda County.

Q. Are you presently paroled from the State of California? A. Yes sir.

Q. Were you ever a member of the armed forces?

A. Yes, sir.

Q. Did you receive a discharge?

A. Yes, sir.

Q. On what grounds?

A. Conviction by a civil court.

Q. That is for the same sentence we are talking about, is that correct? A. Yes, sir.

Q. What type of education did you have, Mr. Winkelblack?

A. I had three years university.

Q. Did you graduate from high school?

A. Yes, sir.

Q. Did you receive a college degree or diploma?

A. No, I did not.

(Testimony of Harry Winkelblack.)

Q. Why did you leave school?

A. I had to go to work. I didn't have the money to finish.

Q. Didn't have any money to finish?

A. No, sir.

Q. Are you married, Mr. Winkelblack?

A. Yes, sir. [6]

Q. How long ago did you marry?

A. About three years.

Q. Three years ago? Are you living with your wife presently? A. Yes, sir.

Q. Do you have any children?

A. Yes, I have. I have a son, two years old.

Q. Two years old? Was your son born when you were in California State prison?

A. Yes, he was.

Q. And you and your wife and child live together now, is that correct? A. Yes, sir.

Q. Now, when you were arrested by the California State authorities in San Leandro did you employ an attorney? A. No, sir, I did not.

Q. Did you have an attorney represent you?

A. Yes, sir.

Q. What was his name?

A. I had two. Mr. Golden—Ted Golden, I believe it was, and Bruce Fratis from Alameda County.

Q. Who made the arrangements for their employment?

Mr. Burns: I don't know what materiality this has. He has testified he had an attorney.

(Testimony of Harry Winkelblack.)

Mr. Riordan: He said he didn't employ one but he had one. That was his testimony. [7]

Mr. Burns: It is incompetent, irrelevant and immaterial, and hearsay as to these defendants.

Mr. Riordan: There is going to be a co-conspirator.

The Court: I will overrule the objection.

Mr. Burns: You don't mean to say he is a co-conspirator on the State charge in reference to these people, do you?

Q. (By Mr. Riordan): Do you know Abe Chapman? A. Yes, sir.

Q. When did you first meet Mr. Chapman?

A. In 1944 when I went to Leavenworth Penitentiary.

Q. You met him in the penitentiary?

A. Yes, sir.

Q. And when did you next see Mr. Chapman after the penitentiary?

A. In October, 1950, in San Mateo.

Q. Then did you work for Mr. Chapman?

A. Yes, sir.

Q. What type work did you do?

A. I delivered narcotics.

Q. Delivered narcotics? Did he pay you for your work? A. Yes, sir.

Q. What was the basis of pay?

A. Usually $50.00 for each delivery.

Q. $50.00 for each delivery? Did you collect money for Mr. Chapman on some of these deliveries? A. Yes, sir. [8]

(Testimony of Harry Winkelblack.)

Q. The deliveries we are speaking of are narcotics? A. Yes.

Q. Did any of the narcotics you delivered for Mr. Chapman have any type of stamp tax of any kind or nature? A. No, sir, they did not.

Q. Do you know Evan Rogers?

A. Yes, sir.

Q. How did you meet Evan Rogers?

Mr. Burns: May the record show that we object to this testimony on behalf of these two defendants on the ground that there is no connection between them.

The Court: Same ruling.

Q. (By Mr. Riordan): How did you meet Evan Rogers? A. Through Mr. Chapman.

Q. When did you first meet him?

A. Just before Christmas, 1950.

Q. Did you sell any narcotics to Rogers?

A. Yes, sir.

Q. About how much?

A. Approximately a kilo and a half.

Q. How much is a kilo?

A. Two and two-tenths pounds.

Q. These narcotics belonged to who?

A. Abe Chapman.

Q. Abe Chapman? And did you, yourself, receive any money [9] from Rogers for the delivery of these? A. No, sir.

Q. Do you know Edward Sahati?

A. Yes, sir.

Q. When did you meet Ed Sahati?

(Testimony of Harry Winkelblack.)

A. Through Mr. Chapman.

Q. When did you meet Ed Sahati?

A. In January, 1951.

Q. Did you have narcotics dealings with Mr. Sahati? A. Yes, I did.

Q. Did you sell him narcotics?

A. Yes, sir.

Q. And the narcotics belonged to——

A. Mr. Chapman.

Q. Did you receive any money from Mr. Sahati?

A. Yes, sir.

Q. Approximately how much?

A. Approximately $10,000.00.

Q. Do you know a Woody Zaine?

A. Yes, sir.

Q. Did you have narcotics dealings with him?

A. Yes, sir.

Q. Did you sell him narcotics?

A. Yes, sir.

Q. Were they Chapman's narcotics? [10]

A. Yes.

Q. Did you receive money from Mr. Zaine?

A. Yes, I did.

Q. Approximately how much?

A. Well, this is all in the same money with Sahati.

Q. The same as with Sahati? A. Yes, sir.

Q. In other words, the Sahati and Zaine shells were joint sales?

A. That is correct. Mr. Zaine usually came after the narcotics for Mr. Sahati. They lived together.

(Testimony of Harry Winkelblack.)

Q. Do you know John Phelps?

A. Yes, sir.

Q. Did you have narcotic dealings with him?

A. Yes, I did.

Q. Did you sell narcotics to him?

A. Yes, sir.

Q. Approximately how much?

A. Approximately ten or fifteen ounces.

Q. Did you receive any money from Phelps?

A. Yes, I did.

Q. Approximately how much?

A. Oh, approximately $5,000.00.

Q. And those narcotics belonged to Chapman, I think you testified? [11] A. Yes, sir.

Q. Do you know a John Durand?

A. Yes, sir.

Q. Did you have any narcotic dealings with him? A. Yes, I did.

Q. About how much did you sell him?

A. Around ten ounces, as I recall.

Q. How much money did you receive?

A. About five thousand.

Q. Do you know a Joseph Palm?

A. Yes, sir.

Q. Did you have any narcotics dealings with him? A. No, sir.

Q. How did you meet Joseph Palm?

A. Through Mr. Chapman.

Q. Where did you meet him?

A. At Bones' Corner in San Francisco.

Q. Is that Bones Remmer?

(Testimony of Harry Winkelblack.)

A. Yes. Taylor and Eddy Streets.

Q. How many times did you meet him?

A. Two times.

Q. What was the purpose of that meeting?

Mr. Burns: I object to the question as being incompetent, irrelevant and immaterial; calling for the conclusion and opinion of this witness. He said he didn't sell him any [12] narcotics.

The Court: Well, the form of the question is objectionable, as to the purpose.

Q. (By Mr. Riordan): Do you know Joseph Olivero? A. I never met him, no sir.

Q. Do you know him as Joe Oliver?

A. Yes.

Q. Did you have any narcotics dealings with him? A. Yes.

Q. What were those dealings?

A. Received one package. I wrote a letter to Mr. Oliver for Mr. Chapman and received a package from the same person from Kansas City.

Q. Approximately how much did you receive?

A. Half a kilo.

Q. Do you know Michael DePinto?

A. Yes, sir.

Q. Did you have any narcotics dealings with him? A. Yes, sir.

Q. Do you know Harry Weimer?

A. Yes, sir.

Q. Did you have any narcotics dealings with him? A. Yes, I did.

Q. Same type as these others you referred to.

(Testimony of Harry Winkelblack.)

A. Yes, sir. [13]

Q. Do you know Donald Meyer?

A. Yes, sir.

Q. Did you have narcotics dealings with him?

A. Yes, I did.

Q. These dealings were all—the narcotics that were transferred belonged to Chapman, is that correct? A. That is right.

Q. Do you know Mario Balestreri, the defendant? A. I haven't ever met him, no, sir.

Q. Have you ever seen him? A. Yes.

Q. About how many occasions?

A. Five or six times.

Q. If you saw him again would you know him?

A. Yes.

Q. Do you see him in this Court room?

A. Yes, that is him over at the table.

Q. Point him out to the jury.

A. Next to the attorney that was standing up.

Mr. Riordan: Let the record show that the witness identifies the defendant, Mario Balestreri.

The Court: Very well.

Q. (By Mr. Riordan): When did you first see the defendant, Mario Balestreri?

A. On February 1st, 1951. [14]

Q. Was anyone with you when you saw him?

A. Mr. Chapman.

Q. What was the occasion of that?

A. Mr. Chapman went to San Jose to find Mr. Balestreri and stopped at Tom's bar on First Ave-

(Testimony of Harry Winkelblack.)

nue there in San Jose, and he wasn't able to locate him there. I was driving the car. Then he had me drive to a residence in San Jose. His car wasn't there.

Then he had me drive him to a farm near San Jose and I let Mr. Chapman out at this place. He went in and was in the house for ten or fifteen minutes, came out. The two men came out on the porch and I stayed in the car and I wasn't introduced to him nor had no conversation with Mr. Balestreri, but when Chapman entered the car he said——

Mr. Burns: Pardon me. I object to any conversation between this witness and Mr. Chapman in the absence of the defendant.

Q. (By Mr. Riordan): Did you hear any conversation when they came out of the house between Mr. Balestreri and Mr. Chapman?

A. The only conversation I heard was when Mr. Chapman left he said he would see him.

Mr. Burns: Pardon me, is this a conversation you heard Mr. Chapman have with Mr. Balestreri?

The Witness: Yes.

The Court: Objection overruled. [15]

The Witness: ——said to Mr. Balestreri he would see him the next day and pick it up.

Q. (By Mr. Riordan): "Pick it up"?

A. That is all.

Q. Do you know whether Mr. Chapman saw Mr. Balestreri next day? A. Yes, sir.

Q. Where did that take place?

(Testimony of Harry Winkelblack.)

A. Near a Chinese supermarket on 4th street in San Jose.

Q. What time of day was this?

A. This was in the afternoon, I imagine around two o'clock.

Q. And what did you observe on that day?

A. I was instructed to park in this parking lot at the Chinese supermarket and to go inside the supermarket and wait until Chapman gave me a sign to come out. So I drove to this place with Mr. Chapman. I entered the supermarket and where I could look out of the window from the counter, and Mr. Chapman waited near the front, near the telephone booth.

A car pulled up to the curb and Mr. Chapman got in. He was only gone two or three minutes, stepped out of the car and motioned to me as he came by and I went directly to the car.

Q. That is, to your own car? A. Yes.

Q. Go ahead.

A. When I got in the car Mr. Chapman took a small sack from [16] his pocket and set it on the floor of the car between us and told me to drive back to Burlingame. So I let Mr. Chapman out near his car on 29th Street and El Camino in San Mateo. I took the package home to my home in Burlingame, opened it, and it did contain narcotics, five ounces of heroin.

Q. Let's go back. When Mr. Chapman told you to go in the store, you said a car drove up and

(Testimony of Harry Winkelblack.)

Chapman got in. Do you know whose car he got into, that car you speak of that drove up?

A. I don't know whose car it was, no.

Q. Who was driving the car?

A. Mr. Balestreri.

Q. You say the car returned again?

A. Yes. Apparently went right around the block.

Q. In how long did it return?

A. About three or four minutes, I would judge.

Q. Did you see the car come back?

A. Yes, sir.

Q. Who was driving the car?

A. Balestreri.

Q. And it stopped in front of the supermarket where you could see it? A. Yes.

Q. And Chapman got out of the car?

A. Yes, sir.

Q. He motioned to you to come? [17]

A. To return to the car.

Q. Then Mr. Chapman set a package down?

A. On the floor of the car.

Q. On the floor of the car?

A. Between us, yes, sir.

Q. That is, in the front seat? A. Yes, sir.

Q. Floor of the front part of the car?

A. Yes.

Q. And you took the package to your residence in Burlingame? A. Yes.

Q. Opened it? A. Yes.

Q. And it contained what?

A. Contained five ounces of heroin.

(Testimony of Harry Winkelblack.)

Q. When is the next time that you saw Mr. Balestreri?

A. It was on Washington's Birthday, February 22nd, 1951.

Q. And when and where was that?

A. Well, I drove Mr. Chapman to a filling station—I don't recall what it was—in Redwood City, on Bayshore.

Q. Bayshore highway in Redwood City?

A. Yes, sir. I don't know what the side street was. I parked on the side street right by the station, and Chapman got out, and he asked me if I had a newspaper in the car, took the newspaper with him and went to the rest room in this filling [18] station. He waited out in front of the rest room, and we were there for quite a while waiting, and he used the telephone there.

Q. Who used the telephone?

A. Mr. Chapman.

Q. Did you see him use it?

A. I could see him in the booth, yes, sir. I was parked right alongside a ditch on this side street.

After waiting about thirty minutes a man came walking toward my car on this side street, and he walked within three or four feet of my car, and Mr. Balestreri walked by and Chapman——

Q. That was the defendant, Mario Balestreri?

A. Yes.

Q. Go ahead.

A. Chapman saw him coming, so he went in the rest room and Mr. Balestreri walked in right be-

(Testimony of Harry Winkelblack.)

hind him, and Chapman came out first, returned to the car, and he had a newspaper in his hand and he had a small package inside it, and he put it on the floor of the car again and we returned to Burlingame.

Q. You took the package back to Burlingame?

A. Yes.

Q. Whereabouts in Burlingame?

A. To my apartment.

Q. Did you open the package?

A. Yes. [19]

Q. What did it contain?

A. I think it was three ounces of heroin.

Q. When is the next time you saw the defendant, Mario Balestreri?

A. I believe it was a couple of days later, because we were expecting a shipment from New York on the 22nd and it hadn't arrived, and for that reason he went to San Jose.

Mr. Burns: I will move that be stricken, that "we were expecting * * * and for that reason," as being a conclusion and opinion of this witness.

The Court: Very well, it may go out.

Q. (By Mr. Riordan): Continue.

A. The package hadn't arrived from New York that we expected.

Mr. Burns: May I ask the Court to admonish the witness?

Q. (By Mr. Riordan): Just continue from there, Mr. Winkelblack. After that what did you do?

The Court: Just state what you did.

(Testimony of Harry Winkelblack.)

Q. (By Mr. Riordan): Just state what you did. I asked you, when is the next time you saw Mr. Balestreri? A. Approximately two days later.

Q. After Washington's Birthday?

A. Yes, about the 25th of February.

Q. All right.

A. We received a package from the east, and I took three ounces from this package and was instructed to meet Mr. [20] Balestreri near the Ben Franklin's Hotel in San Mateo as he wanted to return the three ounces that he had borrowed from Mr. Balestreri.

Q. You say you took it from a package you received from the east? A. Yes.

Q. From whom was that package received?

A. It was from Waxey Gordon, but I had written to Joe Littman for the package.

Q. At this time you are speaking of, about February 25th, did you see Mr. Chapman return the package to the defendant, Mario Balestreri?

A. Yes, I did.

Q. And that was where?

A. Between 3rd and 4th in San Mateo, back of the Ben Franklin Hotel.

Q. In back of the Ben Franklin Hotel?

A. Yes, sir.

Q. And how much narcotics were in the package? A. Three ounces.

Q. How do you know there were three ounces?

A. I put it there. I kept all the narcotics.

(Testimony of Harry Winkelblack.)

Q. You kept all the narcotics for the benefit of Mr. Chapman? A. Yes.

Q. And you would fill the orders? [21]

A. Yes.

Q. And then when was the next time that you saw the defendant, Mario Balestreri?

A. Around the first of March. I don't recall the exact date.

Q. Where?

A. In San Jose near this same Tom's Bar on First Avenue. I recall that because at the same time I picked up a set of scales that Mr. Chapman said belonged to Balestreri, he gave them to him.

Q. I show you a set of scales from Plaintiff's Exhibit 8 and ask you if you can identify these?

A. Looks exactly like the kind of set we picked up in San Jose. I couldn't say if this is the same scales.

Q. When you picked up those scales in—when was that, Mr. Winkelblack? Around March 1st, 1951, in San Jose? A. Yes.

Q. What did you do with those scales?

A. I took them to my apartment in Burlingame and kept them.

Q. You always kept them in your apartment?

A. Yes, sir.

Q. All right, what did you use these scales for?

A. We didn't use them after all. We got them to weigh heroin with them, but we always just measured it anyway, so we tested the scale against the measuring to see if it measured out about the

(Testimony of Harry Winkelblack.)

same, and it did and we didn't bother with it. [22]

Q. But you got those scales from the defendant, Balestreri?

Mr. Burns: Pardon me——

The Court: No, he didn't say that.

Mr. Burns: That is not the evidence, and he didn't say that.

Q. (By Mr. Riordan): Who did you get the scales from?

A. Got the scales in San Jose. Mr. Chapman told me he got them from Balestreri.

Mr. Burns: I move what Mr. Chapman told him be stricken.

The Court: That may go out for the time being.

Mr. Riordan: Stipulated.

Q. (By Mr. Riordan): Well, now, tell us what took place when you and Chapman went to San Jose? A. The real purpose——

Mr. Burns: Pardon me. Again may I ask the Court to admonish the witness not to give us conclusions?

The Court: Yes, just state what happened.

Q. (By Mr. Riordan): You and Mr. Chapman went down to San Jose? You named some place approximately around First Street in San Jose?

A. Tom's bar on First Avenue, between First and Second Avenues that I was parked, and again we bought three or four ounces of heroin.

Q. Where did you get the three or four ounces of heroin from?

A. Mr. Balestreri. He drove up directly across

(Testimony of Harry Winkelblack.)

from where I [23] was parked. Mr. Chapman walked from my car across the street, was handed a package, returned directly to my car, and put it in the usual place on the floor and I took it back to Burlingame.

Q. Now, did you see Mr. Balestreri again after this?

A. I saw him on March the 15th, income tax day.

Q. Where did you see him then?

A. At this same Chinese supermarket near 4th Avenue in San Jose.

Q. Tell us what you observed and did there?

A. On this particular day I drove Mr. Chapman to San Jose, and we were to pick up a package, and on the way he stopped at Levine's Jewelry Store in San Jose, which is also on First Street, and he picked up a diamond ring at this jewelry store to show a friend of his in San Mateo.

And I took him from there to this same Supermarket and the same thing occurred. I went inside. Mr. Chapman waited outside, got in the car when it pulled up of Mr. Balestreri. He rode around the block, came back, had the package with him, and he motioned for me to come out.

As we started to drive away he felt in his pocket and he couldn't find this diamond ring he had just bought. And it was in a box inside a little sack. So he became quite excited, and he moved the car seat out and everything, looking for the ring, and he had me let him out a couple of blocks away

(Testimony of Harry Winkelblack.)

and he called [24] a cab and went to look for the ring. He thought he had left it in Balestreri's car, and he told me to stay there——

Mr. Burns: I will object that what Mr. Chapman thought, as testified by this witness, is a conclusion impossible for him to draw, and I would ask that it be stricken.

The Court: That part of the answer may go out.

Q. (By Mr. Riordan): Then what took place next, Mr. Winkelblack?

A. He told me to wait at Tiny's Drive-in in San Jose until he got there, and he came back and said he had contacted Mr. Balestreri but the ring wasn't in his car, and that he had gone back to the jewelry store and told Mr. Levine that he had lost the ring, and asked me to put an ad in the paper, which I did, the San Jose Paper, a couple of days later.

Q. After Mr. Balestreri came back the second time to the market, which was near to three to five minutes after he left with Abe Chapman, when the car returned, did you notice who was driving the car? A. The same person. Mr. Balestreri.

Q. Mr. Balestreri? A. Yes.

Q. Did you see Chapman get out of the car?

A. Yes.

Q. Did he have anything in his hands?

A. No, he didn't. [25]

Q. Then what happened right after that?

A. He returned to our car and put the package

(Testimony of Harry Winkelblack.)

on the floor, and as he took the package out, that is when he missed this ring.

Q. Did the package remain on the floor?

A. Yes.

Q. The package remained on the floor for how long?

A. I kept it on the floor—when I waited at Tiny's I put the package back under the seat and sat there at the counter at Tiny's, then drove back to Burlingame with Mr. Chapman, came back and took the narcotics to my apartment in Burlingame.

Q. Did the package contain narcotics?

A. Yes.

Q. You looked? A. Yes.

The Court: We will take the morning recess. Please bear in mind the admonition of the Court not to talk about the case.

(Short recess)

Q. (By Mr. Riordan): Now, Mr. Winkelblack, referring to the meeting that you witnessed between Chapman and defendant, Mario Balestreri, on March 15th when the package was on the floor of your car, you returned it to your home, is that right? A. Yes.

Q. Did you open the package?

A. Yes, sir. [26]

Q. What did it contain? A. Heroin.

Q. Do you know the approximate amount?

A. Either three or five ounces.

Q. When was the next time that you saw defendant, Mario Balestreri?

(Testimony of Harry Winkelblack.)

A. On the morning of the date of my arrest, March 21st.

Q. And where did you see him?

A. At San Mateo near the Williams Store, around 35th and El Camino.

Q. In the City of San Mateo? A. Yes.

Q. In the State of California? A. Yes.

Q. What did you observe at that time? Just a moment. Was Mr. Chapman with you at that time? A. Yes, sir, he was.

Q. Was he in your automobile?

A. No, he wasn't. He rode there with me.

Q. Then what happened?

A. I parked in the parking lot near the Andy Williams Store, and we waited there for quite some time. So I finally drove a block away in my car and Chapman waited near the Andrew Williams Store, and Mr. Balestreri drove up.

He walked approximately a block this same morning with [27] Chapman, and Chapman met me back at my car with the package which contained ten ounces of heroin, and I returned to my home in Burlingame.

I had about seven ounces of heroin in my home already and we had a sale for fifteen ounces that day and that was the reason he had to buy an additional ten ounces to mix with the seven ounces which were from Mr. Littman.

Mr. Burns: Pardon me, I didn't get that portion of the witness' answer.

The Court: Read the answer.

(Testimony of Harry Winkelblack.)

The Witness: I had written——

Mr. Burns: Pardon me. Will you read the answer.

(Answer read by the reporter.)

Q. (By Mr. Riordan): Mr. Winkelblack, I will show you Plaintiff's Exhibit 7, for identification. Do you recognize that?

A. Looks like the two packages that were in my residence.

Q. On the day of your arrest? A. Yes, sir.

Q. Are these the two packages you were charged with the crime for in San Mateo Superior Court?

A. Yes, sir.

Q. And what was your testimony, or did you testify as to the approximate weight?

A. Yes, I did. Approximately twelve or eighteen ounces was [28] in my house. I had fifteen ounces already measured out that I had measured in two packages, ten ounces I picked up that morning, mixed with the five ounces that I already had in my house that we had received from Littman earlier.

Q. Do you know the defendant, Joseph Littman? A. No, sir, I do not.

Q. Did you ever have any correspondence with the defendant, Joseph Littman? A. Yes, sir.

Q. What type of correspondence did you have?

A. On January the 1st or 2nd, 1951, Mr. Chapman asked me if it would be all right if he had a

(Testimony of Harry Winkelblack.)

package sent to my home, and if my wife was home all the time, he asked if I would have the package mailed to her, and I told him it would be all right.

So he had me write a letter to Joseph Littman. I don't recall the address in Patterson, New Jersey. He instructed him to send the package that had been agreed on by phone to Mrs. Rosemary Wink, 706 Peninsula, in Burlingame, my home address.

This was on January 2nd, I believe. On January 6th, we moved from the peninsula address to Highland Avenue in Burlingame, and therefore weren't at home to receive the package, so we asked this lady who lived in the same apartment house to sign for the package if it came as it would come by registered mail, which she did. When she received the package, she phoned [29] us at our apartment and I drove to her home and picked up the package, took it to my apartment and opened it, and it contained a kilo of heroin.

Q. And that was received as a result of your sending a letter to Joseph Littman in Patterson, New Jersey, on January 2nd, 1951?

A. Yes, sir.

Q. Did you ever send any money for this heroin to Joseph Littman? A. Yes, sir.

Q. Will you explain the details of your paying for this one kilo of heroin?

A. We went sometimes to Siegel's store in Oakland, California on Broadway; and on another occasion I recall I went to Bixley's Clothing Store, 4th Avenue, in San Mateo.

(Testimony of Harry Winkelblack.)

We would buy two or three Jackman's shirts each time and put the money in $100.00 bills between the shirts, and I would wrap the package just roughly, and then Mr. Chapman would take the package to a stationery store and have it rewrapped and mailed to Mr. Littman in Patterson, New Jersey. I usually made out the label for him myself.

Q. You usually made out the label yourself?

A. Yes, sir.

Q. And it was a package with the shirts with the money inside of it addressed to Joseph Littman, Patterson, New Jersey? [30] A. Yes.

Q. Approximately how much would you send to Joseph Littman by this method in payment of the one kilo of heroin, for instance?

A. He didn't pay it off all at once. He would send five to ten thousand dollars cash at a time, because he paid him ten thousand for each kilo.

Q. Would he pay it off as he sold some of it, is that it? A. Yes.

Q. In other words, it was a consignment arrangement? A. Right.

Q. On any other occasion that you recall did you carry out this type of arrangement between Chapman and Joseph Littman?

A. Yes. I wrote to Mr. Littman again on February 13th. I recall this date because I was at the airport, United Airlines Airport, in South San Francisco, at the same time Mr. Chapman was at the airport going to Seattle—I was going to Reno—and he had me get a card from the card counter

(Testimony of Harry Winkelblack.)

at the airport and write on this card to Mr. Littman asking him to send another Kilo, and this time I gave him the address of a friend in San Leandro.

Q. Do you remember the friend's name?

A. It was a friend of my wife's and at this time—It was sent to this address in San Leandro. I put in the card to mail to Mrs. Rosemary Wink, c/o Mrs. Eva Lewis at this house [31] in San Leandro.

Q. What was the relationship between your wife and Mrs. Eva Lewis?

A. They had worked together in a restaurant in Oakland. In fact, they had a restaurant between them on a consignment basis in Oakland at one time.

Q. Did you ever receive the package that you requested of Joseph Littman?

A. Yes, sir. This package was received on February the 23rd, I believe, the day after Washington's Birthday.

Q. And what did the package contain?

A. The package contained one kilo of heroin.

Q. And that is what you requested in this letter you refer to on February 13, 1951, that you mailed to Joseph Littman in Patterson, New Jersey?

A. Yes, sir.

Q. Did you have any other such dealings?

A. Yes. I wrote to him again about the 15th or 16th of March and asked for a kilo of heroin and three ounces of cocaine, and this was the package I was eventually arrested with.

(Testimony of Harry Winkelblack.)

Q. Where did you ask the package to be mailed?

A. I asked it to be mailed to the same place, Mrs. Eva Lewis, in care of—I forget the last name, on Riva Street in San Leandro, California, to Mrs. Rosemary Wink.

Q. That is the date you say you were [32] arrested? A. Yes, sir.

Q. Did you go to Mrs. Lewis' house in San Leandro to pick up the package? A. Yes.

Q. How did you know the package was there?

A. I instructed her a couple of days before that to call me when the package came in, and on March 23rd about noon she called our home and told my wife to tell me the package was there, and we drove over to San Leandro.

This was Good Friday, March 23rd, 1951. And we entered her home and she came out with the package from her bedroom. It was still wrapped. And I put the package on the davenport and we talked for a few minutes, walked out of the house with the package and drove approximately two blocks before the narcotic agents flagged us, flagged our car, and arrested us.

Q. When they arrested you did you have the package in your possession?

A. I had the package on the floor of the car, and they took the package and told me what it contained.

Q. At the time you were arrested did you tell the agents where they could find any narcotics?

(Testimony of Harry Winkelblack.)

A. Yes.

Q. What did you tell them?

A. I told them there was approximately half a kilo in my apartment in Burlingame in the china closet. [33]

Q. That was the half kilo, the seventeen and one-half ounces you referred to when you identified Plaintiff's Exhibit 7, in evidence for identification?

A. Yes, sir.

Mr. Riordan: Now, your Honor, I believe the foundation has been laid. Can I go into declarations now?

I think there is evidence sufficient?

The Court: You mean from this witness you wish to ask conversations?

Mr. Riordan: Yes.

Mr. Burns: I don't understand this witness to have ever had a conversation with either of these defendants.

Mr. Riordan: It isn't necessary.

The Court: It isn't necessary. I think you had better ask the questions you have in mind and give counsel an opportunity to object and I will rule on them.

Q. (By Mr. Riordan): Going back to February 1st, 1951, you testified that you and Mr. Chapman, Abe Chapman, took a trip down to San Jose. Mr. Chapman made a statement to you——

Mr. Burns: I object to leading and suggestive questions on the part of the prosecuting attorney.

(Testimony of Harry Winkelblack.)

If he is going to ask about conversations, he should fix the time and place and persons present.

Mr. Riordan: I just did that.

Mr. Burns: You asked if Mr. Chapman said such and such. [34]

The Court: He hadn't said that yet.

Mr. Burns: I was anticipating that he would.

Mr. Riordan: Do you want the question read again?

The Court: Read what Mr. Riordan said to the witness.

(Whereupon statement of Mr. Riordan was read by the Reporter.)

The Court: You want to elicit a conversation he had with Chapman on that occasion?

Mr. Riordan: Yes. We laid a foundation what they were going for.

The Court: Do you want to ask him what was said?

Q. (By Mr. Riordan): What was said?

The Court: Do you object?

Mr. Burns: The original objection was that it is incompetent, irrelevant and immaterial. Likewise, the form of the question is leading and suggestive. Did he have a conversation with Mr. Chapman would be proper.

The Court: That is what he has now asked him, if he had a conversation with him at that time. I suppose your next question is going to be what the conversation was?

(Testimony of Harry Winkelblack.)

Mr. Riordan: Yes, your Honor.

The Court: So the record would be clear, you should have an opportunity to object.

Mr. Burns: When he asks the question, "What was the conversation," we will make our [35] objection.

The Court: Go ahead.

Q. (By Mr. Riordan): Did you have a conversation with Mr. Chapman on the way to San Jose, referring to the date February 1, 1951?

A. Yes, sir.

Q. You and Mr. Chapman were together in an automobile? A. That is right.

Q. And you were driving? A. Yes, sir.

Q. What was the conversation?

Mr. Burns: On behalf of both defendants we will object as incompetent, irrelevant and immaterial.

Mr. Riordan: Declarations of——

The Court (Interposing): I am inclined to think that at the present time there is sufficient evidence for introduction of this evidence. It goes to the weight, not admissibility. I will overrule the objection. You may state the conversation.

A. On February 1st—this was in the evening—Mr. Chapman asked me to drive him to San Jose, and he told me that he was going to see Mr. Balestreri to try to make a small purchase of three or five ounces of heroin as he was short from our regular source and needed a little bit more to fill an

(Testimony of Harry Winkelblack.)

order, so I drove him to the places I mentioned previously.

Q. (By Mr. Riordan): Now, referring to the testimony you [36] have given regarding the evening of February 2nd, 1951, and your trip to San Jose to the Chinese Supermarket, were you and Mr. Chapman in the same automobile driving to San Jose? A. Yes.

Q. Did you have any conversations at this time?

A. Yes, sir.

Q. What were the conversations?

Mr. Burns: Same objection.

The Court: Same ruling.

A. He had informed me the night before, after he left Mr. Balestreri, that he was to meet him the following day and pick up the package of heroin, and I followed out his instructions at the Supermarket and picked up the package.

Q. After this package was picked up on February 2nd, 1951, and you and Mr. Chapman got in your automobile, was there any conversation then after the pick-up?

Mr. Burns: Same objection.

The Court: Same ruling.

A. The only conversation was that he had paid him $350 an ounce for this heroin and he was wondering if it was going to be strong enough to cut with the cutting agent we used so that he could make any profit on the deal.

Q. (By Mr. Riordan): Now, Mr. Winkelblack, I will show the contents of Plaintiff's Exhibit 8,

(Testimony of Harry Winkelblack.)

for identification. Can [37] you identify these blue and white cans marked "milk sugar"?

A. Yes, sir. I use milk and sugar to dilute the heroin with. I had three or four cans. Maybe some of them were empty, but I had at least two full cans in my apartment.

Q. These are used to dilute heroin?

A. Yes.

Q. This blue package in Plaintiff's Exhibit 8, for identification, do you know what that contains?

A. Right off——

Q. Well, open it.

A. I am not sure if it is weights for the scales or what it is.

Q. All right. A. I don't remember.

Q. The other contents of this box, can you identify for the Court, please? Will you look in the box and identify the other objects?

A. Well, I had several cellophane bags that, after I had diluted the heroin, I measured it out for whatever sale we had. If it was for five ounces, I would put five ounces in one of these small cellophane bags.

Q. Where did you do that?

A. In my apartment, on the kitchen table.

Q. Who would be present?

A. Sometimes Mr. Chapman. Ordinarily by myself. [38]

Q. How would the arrangement be made by Mr. Chapman in giving you orders for those?

A. Mr. Chapman would have me meet him at

(Testimony of Harry Winkelblack.)

Uncle Tom's, and he would tell me he had a sale for whatever amount he had, ask me to go home and put that amount in one of the cellophane bags and instruct me where to deliver it to.

Q. Tell me, was your wife ever present when you were doing this?

A. No, she wasn't. My wife was working part-time then.

Q. Can you tell us what some of the other objects are in Plaintiff's Exhibit 8 for identification?

A. Well, I have a spoon here to measure it with. And if we had a larger order, ten of fifteen ounces, I would have a cellophane bag inside one of these large brown envelopes so that if it came open you wouldn't lose it.

And I ran out of cellophane bags one night, and no stores were open, and I remember borrowing these from Langendorf's Hot Dog Stand to put heroin in.

I think that is about all that is in there except wrapping paper.

Q. Do you recognize the box?

A. No, I don't.

Q. These items you have just identified were seized from you about March 23rd, 1951?

A. Yes. [39]

Q. Now, at the time you drove Mr. Chapman down to the gasoline station on Bayshore Highway in Redwood City, did you have any conversation on that automobile trip with Mr. Chapman?

A. Yes, sir.

(Testimony of Harry Winkelblack.)

Q. What was the conversation?

Mr. Burns: Same objection.

The Court: Same ruling.

A. He told me that he was to meet Mr. Balestreri at this filling station, for me to wait on the side road, and as soon as he arrived he would come to my car, and that was the general conversation.

Q. (By Mr. Riordan): Then after Mr. Chapman came out of the rest room, I think you testified—— A. Yes, sir.

Q. ——and got in your automobile; was there any conversation after that?

A. None except, "let's get back to Burlingame." He had an appointment some place.

Q. You testified to driving Mr. Chapman on March 15, 1951, down to San Jose, to a jewelry store and then the Chinese Supermarket. On the trip down was there any conversation between you and Mr. Chapman? A. Yes.

Q. What was that conversation?

A. Well, he told me that he was to pick up this package [40] from Mr. Balestreri, but first he wanted to go to this jewelry store of Mr. Levin's as a friend of his wanted to buy a diamond ring and he was going to pick up the ring to show the party after we returned to San Mateo.

Q. All right. After you and Mr. Chapman got back in the automobile on this date at the Chinese Supermarket, were there any conversations?

A. Well, we didn't talk long. As soon as he missed the ring he was quite perturbed about the

(Testimony of Harry Winkelblack.)

fact that he had misplaced the ring. After going through his pockets several times, I only drove a couple of blocks and let him out to take a cab and meet him at Tiny's, but I kept the package of heroin with me all that time that he had picked up.

Q. Was there any conversation concerning the package that was picked up between you and Mr. Chapman at this time?

A. Well, he explained to me what to do with the package when I got it home, as we had some other heroin in the house and he was telling me what amounts to put in different places.

Q. Did he say anything about paying any money to Mr. Balestreri?

A. He did tell me if he had to pay cash or if he was making a trade arrangement.

Q. Or if he received money from Mr. Balestreri for sales to him? A. Yes.

Q. And these narcotics that you delivered, or that you and [41] Chapman delivered to Mr. Balestreri, where did you or Mr. Chapman obtain these narcotics?

A. In most cases from the orders that I had received from Mr. Littman in New Jersey.

Q. Now, besides these dealings with the defendant Joseph Littman and the defendant Mario Balestreri, did you make deliveries to other persons that you have mentioned? A. Oh, yes.

Q. And were they your customers or were they customers of Chapman?

A. They were all customers of Mr. Chapman.

(Testimony of Harry Winkelblack.)

Q. Did Mr. Chapman introduce you to all those customers?

A. Yes, he did. In most cases, yes. Some of them didn't want to be introduced.

Mr. Burns: I move to strike that.

The Court: Yes, the last part may go out.

Q. (By Mr. Riordan): Did you know Joe Pitta? A. No, sir.

Q. Did you know Michael Peccini?

A. I saw him on two or three occasions, yes. He was pointed out to me by Mr. Chapman at the Lake Merritt Hotel in Oakland.

Q. Did you ever hear Mr. Chapman either Joe Pitta or Michael Peccini? A. Yes.

Q. What were the conversations at that [42] time?

Mr. Burns: We make the objection, likewise, incompetent, irrelevant, and immaterial.

The Court: Overruled.

A. In the early part of January Mr. Chapman told me that he had been to San Jose and that he had been informed by Mr. Balestreri that a Joe Pitta was working with the Government agents going out and making sales and purchases for the Government, and that he had sold to—Mr. Chapman himself had sold heroin to these two men, Joe Pitta and Mike Peccini, earlier in 1950, and that it was just a matter of time before he would be arrested, and that was the reason he was going to introduce me to his customers up and down the coast.

(Testimony of Harry Winkelblack.)

Q. You mean Mr. Chapman was, when he learned Michael Peccini was a Government narcotics agent and Joe Pitta was an informer, he was in fear of being arrested at any time?

A. That is right. He told me he was certain they were just waiting, as they did in other cases, and that he would be arrested almost any time, just depended on when they wanted to make the arrest.

Q. Because he made the sales to Michael Peccini and Joe Pitta, is that right? A. Yes.

Q. Did Mr. Chapman tell you how he knew Michael Peccini was a Government agent?

A. He told me Mr. Balestreri had told him that it was his [43] belief that he was a Government agent and that Joe Pitta was working with him.

Q. And so Mr. Chapman was introducing you to all his customers, then? A. That is right.

Q. What was the reason for that?

A. So that in the event he was arrested I could carry on the business for him.

Q. That is, the narcotics business?

A. Yes.

Q. Did he say anything else about Joe Pitta or Michael Peccini?

A. Shortly after Joe Palm had gone to the penitentiary his sister—I believe her name is Mary Hare—called Chapman and told him she wanted to see him, very urgent business, and to meet her at Bones' corner at Taylor and Eddy Streets, which he did.

(Testimony of Harry Winkelblack.)

I went with Mr. Chapman to this place and met Mary Hare.

I did not sit in on the conversation, but when Abe and I returned to the car he told me Mrs. Hare had been to visit her brother, and that he had sent word back that it was definite that Joe Pitta was working with the Government, with this Mike Peccini, that for Abe to stay away from him at all costs, not go near him for anything, so that when Chapman returned to the car he was positive they were Government men [44] and he was convinced.

Q. Is that the only conversation Chapman had with you concerning a Government agent?

A. Well, many times after he was so positive they were, he would make the remark that Joe and Mike would have to go, that they would have to be gotten rid of some way.

Q. Do you know William Levin and Frank McKee? A. Yes, sir.

Q. When did you first meet them?

A. In January or February, 1951, in San Mateo.

Mr. Riordan: May I ask the reporter to repeat that part of one answer?

The Court: Surely.

Mr. Riordan: The answer to other question, I think the words before were, "Joe and Mike would have to go."

(Thereupon the Reporter read: "that they would have to be gotten rid of some way.")

Mr. Riordan: Thank you.

(Testimony of Harry Winkelblack.)

Q. (By Mr. Riordan): You met them in San Mateo, you said? A. Yes, sir.

Q. And how did you meet them?

A. I drove Mr. Chapman there on a Sunday morning and met them right across from the Post Office Building in San Mateo.

Q. That is the City of San Mateo?

A. Yes, sir. [45]

Q. What was the purpose of that meeting?

A. To make arrangements for a sale of heroin to McKee and Levin.

Q. And what arrangements were made, or what was done?

A. The arrangements were made to deliver ten ounces—seven or ten ounces to McKee and Levin at Oliver's Restaurant in South San Francisco.

Q. And what took place then, at Oliver's Restaurant in South San Francisco?

A. Delivery was made. I took the package, as instructed, to Oliver's Restaurant and parked in front of the restaurant, and they drove up and Chapman took the package from me and handed it to Levin and McKee, which were only about ten or twenty feet from me.

Q. Did you see the actual package?

A. Yes.

Q. Did you have any other dealings with William Levin and Frank McKee?

A. Yes, sir. I took a sample of heroin to McKee one time on 19th Street in San Francisco, and on another transaction I took some opium which was

(Testimony of Harry Winkelblack.)

partially cooked to William Levin at his restaurant on Hyde Street, and he finished boiling down this opium and returned the solidified product to us a few days later after he had boiled it down.

Q. Have you talked to either William Levin or Frank McKee [46] since your arrest?

A. No, sir.

Q. You were arrested on March 23rd, 1951?

A. Right.

Q. You have not talked to them from that date until this? A. No, sir.

Mr. Riordan: That is all, your Honor.

Mr. Burns: Does your Honor wish me to proceed?

(Discussion regarding recess omitted.)

The Court: We will take a recess until 2:00 o'clock. [47]

Tuesday, August 18, 1953, 2:00 o'Clock P.M.

HARRY WINKLEBLACK

a witness called on behalf of the Government, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as follows:

Cross-Examination

By Mr. Burns:

Q. Mr. Winkleblack, you have never seen Mr. Littman, before today, have you? A. No, sir.

(Testimony of Harry Winkelblack.)

Q. You have seen a picture of him?

A. Not that I recall.

Q. You have never talked to Mr. Littman?

A. No, sir.

Q. I don't believe you have ever talked to Mr. Balestreri? A. No, sir.

Q. Now, with reference to Mr. Littman, you testified to certain communications you addressed to him, is that right? A. Yes, sir.

Q. Now, do you recall the address that was given to you?

A. It was Patterson, New Jersey. I believe it was an address on either 32nd or 23rd Street. It's a long time and I don't recall.

Q. You have had occasion to discuss since that address was furnished to you, haven't you? [48]

A. No, I haven't.

Q. You have talked to Mr. Craig about it?

A. Not about his address, no, sir.

Q. Have you talked to Mr. Karesh about it?

A. No, sir.

Q. When you were arrested on March 23rd, did the officer ask you from whom you had received the shipment? A. Yes, sir.

Q. And from whom did you say you received it?

A. From Waxey Gordon.

Q. Was that the fact?

A. To the best of my knowledge, it was.

Q. That, Mr. Winkleblack, was just an assumption on your part, wasn't it?

A. Only what Mr. Chapman told me.

(Testimony of Harry Winkelblack.)

Q. That is all you know about this whole thing, is what Mr. Chapman has told you?

A. That's right. I addressed letters to Mr. Littman. He told me that the packages were coming from Mr. Gordon.

Q. But you, of your own knowledge, don't even know if there is such a person as Joseph Littman?

A. No, sir.

Q. Or that he lives in Patterson, New Jersey?

A. No, sir.

Q. Every thing you know about Mr. Littman was told to you by [49] Mr. Chapman?

A. Yes, sir.

Q. It is likewise true, is it not, Mr. Winkleblack, that you never at any time saw Mr. Balestreri give anything to Mr. Chapman?

A. I have seen packages come from his possession or premises to Mr. Chapman.

Q. But you weren't there to witness the actual transfer of the package, were you?

A. No, sir.

Q. You didn't search Mr. Chapman before you went into Mr. Balestreri's home, or his automobile, to determine whether or not he already had that package with him? A. No, I did not.

Q. When he returned, he produced a package?

A. Yes, sir.

Q. And so, in testifying here before the ladies and gentlemen of the jury, it is your testimony that what you know about Mr. Littman, you heard from Mr. Chapman, is that right? A. That's right.

(Testimony of Harry Winkelblack.)

Q. What you heard Mr. Balestreri to have done with Mr. Chapman, Mr. Chapman told you, isn't that right? A. That's right.

Q. So you are testifying by way of hearsay?

A. In a manner of speaking, yes. [50]

Q. So you testified, I believe, that you received a shipment from Mr. Littman or "we" received a shipment from Mr. Littman, but you don't know from whom that shipment came?

A. Only that I ordered from Mr. Littman.

Q. You ordered it from a person named Joe Littman, at a certain address that had been furnished you? A. Yes, sir.

Q. Likewise, when you told the authorities on the date of your arrest that the package had come from Waxey Gordon? A. Yes, sir.

Q. How do you arrive at that conclusion?

A. I had been back East previously with Mr. Chapman in the same month and he had made arrangements with Waxey Gordon to receive the merchandise. In fact, I had a half of a bill in my pocket. The other half was supposed to be in Mr. Gordon's possession. In the event I went to New York to pick up the narcotics, Mr. Gordon would know who I was. I was still to address the letters to Mr. Littman.

Q. When was it you made this trip to New York?

A. I didn't go all the way to New York. I stopped in Chicago on March 5, 1951.

Q. March 5, 1951, is that right?

(Testimony of Harry Winkelblack.)

A. Yes, sir.

Q. You stopped in Chicago?

A. And Mr. Chapman went on to New York and phoned me from [51] New York, and came back to Chicago and we drove back from Chicago.

Q. So what arrangements Mr. Chapman made in New York and with whom they were made, all you know is what Mr. Chapman told you?

A. That's correct.

Q. You weren't there?

A. I was not there.

Q. So when you told the authorities in San Leandro that this package came from Waxey Gordon, that was hearsay on your part, wasn't it?

A. Only what I had been told, yes, sir.

Q. You have no other knowledge, do you?

A. No, sir.

Q. Now, this package when it was received by you, did it have a return address on it?

A. I guess it did. I didn't have the package long enough to examine it very closely. It had a return "Chicago" address on it.

Q. Didn't you testify this morning that you were expecting this package from Mr. Littman?

A. Yes, sir.

Q. That you had written to him?

A. I wrote to him about March 16 and asked him to send exactly what the package contained. [52]

Q. And the package came from Chicago shortly after you left Chicago?

(Testimony of Harry Winkelblack.)

A. A matter of two or three weeks. This was on the 23rd; it was approximately 16 days.

Mr. Burns: Mr. Riordan, I believe there was a wrapper that was on this package and that you introduced for identification. The Clerk tells me that the wrapper has been withdrawn. I would like to see it.

Mr. Riordan: We gave the wrappers to the Bureau of Narcotics to be photographed, your Honor, and they haven't been returned. We asked for it right now.

Q. (By Mr. Burns): Well, it is a fact, is it not, insofar as you know, if you know any facts, Mr. Winkleblack, that this package came from Chicago?

A. So I have been told, after my arrest, and I glanced at the return address at the time I was in the party's house to where it was delivered and I believe it was a Chicago post mark.

Q. Air express, isn't that right?

A. I believe so. I didn't receive the package.

Q. It wasn't sent through the mail?

A. I couldn't actually say as to that. All I know, it was sent to Mrs. Eva Lewis in San Leandro and I understood it was to be by air express.

Q. Well, it was sent to your wife, wasn't it? [53]

A. Addressed to my wife, in care of Mrs. Eva Lewis, San Leandro.

Q. And you were expecting this package about the 22nd of March, is that right? A. Yes, sir.

(Testimony of Harry Winkelblack.)

Q. And when was it you had returned from Chicago? A. About March 8th.

Q. Now, did you leave anyone instructions in Chicago to send you this package? A. No, sir.

Q. Now, you know it to be a fact, do you not, Mr. Winkleblack, as you sit there on the stand, that this package was sent from Chicago by Mr. Barney Gold?

A. I have been told that, but I don't know Mr. Gold. All I know is where I ordered it.

Q. And so, if you left the impression with the ladies and gentlemen of the jury that this package came from Mr. Littman, according to Mr. Chapman, that is not correct, is it?

A. I ordered exactly what was in the package from Mr. Littman and the package came. I don't know where it came from.

Q. Well, do you mean to tell the ladies and gentlemen, as you sit there now on the witness stand, you don't know it came from Chicago?

A. I do not. [54]

Q. You didn't see the air express label on the package? A. No, I didn't look at it.

Q. You have had no occasion, during the course of your trial in the State Court or the proceedings in the State Court, to examine it?

A. No, sir. I pleaded guilty and I didn't have any trial.

Q. Wasn't this introduced into evidence?

A. The package was at one time when I was

(Testimony of Harry Winkelblack.)

trying to have my bail reduced, but I wasn't paying any attention to the return address.

Q. Didn't you have a preliminary hearing where they marked these various contents into evidence or about sometime in June? A. Yes.

Q. And this package, likewise?

A. Yes, they were there as evidence.

Q. And the wrapper on it?

A. On that package, I believe it was in Redwood City, sometime in July.

Q. And it is your testimony that you still don't recall seeing that it came from Chicago?

A. No, only by hearsay again I have heard that it came from Chicago from a Mr. Gold, but I don't know Mr. Gold, but up until that time, I was of the understanding it came from New York. [55]

Q. Who supplied the authorities the name of Mr. Gold so he could be included as a co-conspirator? A. In the newspapers.

Q. Just the newspaper? A. That's right.

Q. Mr. Karesh took his name out of the newspaper and included him in the indictment, is that right? A. I don't know about that.

Q. So your testimony, if it was your testimony, that this package came from Patterson, New Jersey, is not the fact, as you now recall the fact, is that right?

A. I don't recall saying it came from Patterson. I ordered it from Patterson, New Jersey.

Q. And you assumed it had been sent by Mr. Littman?

(Testimony of Harry Winkelblack.)

A. I assumed that it came from Mr. Gordon or Mr. Littman.

Q. But you don't know at all who sent the package? A. No, I don't.

Q. So you can't testify here under oath that it was sent by Mr. Littman or any other person, is that all right?

A. All I can say, I ordered it from Mr. Littman.

Q. And you ordered it at the address that was furnished to you, whether Mr. Littman was at that address or not, you can't testify, can you?

A. No.

Q. Whether Mr. Littman ever received any communication from, [56] you, you cannot testify, can you?

A. None other than the letters would be verified by telephone, through Mr. Gordon, the following week.

Q. And who gave you that information, Mr. Winkleblack?

A. I was on the other end of the phone in most instances and when we would send a package of shirts to New York to Mr. Littman, the phone call would come through the following Sunday and I would answer the phone. The call would come to me as Al Green and they would verify the fact that the shirts had been received and the money.

Q. And who was on the other end of the wire?

A. In some instances, Mr. Schiffman and in some instances Waxey Gordon.

(Testimony of Harry Winkelblack.)

Q. You tell us the first time you spoke to Mr. Gordon on the telephone?

A. Well, it was about January the 10th or 11th, 1951.

Q. And your conversation with Mr. Gordon was that he had received certain shirts, is that right?

A. Just asked if he got the shirts.

Q. Did he call you or did you call him?

A. He called me.

Q. And you asked him if he had received the shirts? A. That's right.

Q. He verified the fact that you had?

A. That they had, yes. [57]

Q. When is the first time that you talked to Mr. Schiffman on the phone?

A. Around the same time, probably; the same day. Sometimes they both call on the same morning.

Q. From where were these calls made?

A. Made from New York, to either Uncle Tom's Cabin in San Bruno or Bondy's in Belmont.

Q. Do you recall talking to Mr. Schiffman on March 18?

A. March 18? I don't remember that date, no, sir.

Q. Do you recall telling the agents that you had had such a conversation on March 18th?

A. I talked with Mr. Schiffman on various occasions.

Q. At least, Mr. Winkleblack, you talked to

(Testimony of Harry Winkelblack.)

someone who represented themselves to be Mr. Schiffman?

A. I would recognize Mr. Schiffman's voice or his conversation. I knew Mr. Schiffman quite well at Leavenworth.

Q. And you knew Mr. Waxey Gordon?

A. No, I didn't. I never met Mr. Gordon.

Q. Would you have recognized his voice?

A. No, I didn't. I took their word for it.

Q. I show you, Mr. Winkleblack, this object that has been marked Plaintiff's Exhibit 4 for identification and ask you if you recognize that.

A. Yes, that is the same wrapper the package came to San Leandro on March 23rd. [58]

Q. And do you recall there is a return address on it? A. Yes.

Q. What is that return address?

A. To an address in Chicago, Illinois.

Q. Who is set forth as the sender?

A. It says, "Frank Wink, 5240 Mauldin, Chicago, Illinois" as the return address.

Q. And "Wink" is the name you use, is it not?

A. That's right.

Q. Who is Frank Wink?

A. I don't know.

Q. Did you give instructions to anyone in Chicago to use that name? A. No, sir.

Q. Now, that package, you know now, also arrived in San Leandro, did it not? A. Yes, sir.

Q. It was never in Burlingame?

A. No, sir.

(Testimony of Harry Winkelblack.)

Q. Did Mr. Littman ever send you any packages or anyone that you assumed to be Mr. Littman, send you any packages in San Leandro?

A. This package came to San Leandro from—I ordered it from Mr. Littman. I don't know who it came from.

Q. Previous to the arrival of this package, did you have any [59] conversation with Mr. Barney Gold in Chicago?

A. No, sir, I never heard of the name before.

Q. It is your testimony that you never heard Mr. Chapman mention Mr. Barney Gold?

A. I never did.

Q. You have never heard Mr. Gordon mention Barney Gold?

A. No, I never talked to Mr. Gordon.

Q. You yourself did not address any communications to Mr. Barney Gold? A. No, sir.

Q. Now, the day of your arrest, you said that you had been to either San Jose or either Redwood City or San Mateo in the company of Mr. Chapman and you saw Mr. Balestreri, is that right?

A. That's right.

Q. I believe you testified that you did not witness the transaction, but when Mr. Chapman returned to the car, he had a certain quantity of heroin, is that right?

A. This is on the day of my arrest; the morning. I was arrested in the afternoon.

Q. You were arrested about two o'clock?

(Testimony of Harry Winkelblack.)

A. Yes, sir. This was in the morning, around nine o'clock.

Q. When you say "around the clock," Mr. Winkleblack, could you be a little more specific?

A. As nearly nine o'clock as I can remember.

Q. I don't want to pin you down, but it is rather important. Was it closer to ten or closer to eight?

A. We waited quite awhile there and that's been almost three years ago, so I couldn't say. I know it was in the morning.

Q. You wouldn't care to say?

A. I couldn't say, honestly, no.

Q. How long did you wait, did you say?

A. Approximately an hour.

Q. Where was this waiting done?

A. At the Andrew Williams' store near 35th and El Camino, San Mateo.

Q. And so what time would you say it was that Mr. Balestreri arrived?

A. I would say around nine o'clock.

Q. And you had driven from where?

A. From Burlingame, on the San Mateo-Burlingame line.

Q. And Mr. Chapman was with you?

A. I picked up Mr. Chapman at 29th and El Camino Real, by the "Winner's Circle Tavern."

Q. You hadn't made any arrangements for this meeting personally, had you?

A. No, I hadn't.

Q. It was about ten o'clock, you say, that Mr. Balestreri arrived, is that right? [61]

(Testimony of Harry Winkelblack.)

A. Around nine; between nine and ten. I cannot recall the exact time.

Q. And then you, I believe you testified, took the object that you received from Mr. Balestreri to your home in Burlingame? A. That's correct.

Q. And when was it that you heard that this package had arrived from San Leandro for your wife? A. About noon on this date.

Q. And where were you when you received that?

A. A telephone call, at home, in Burlingame.

Q. You had returned to your home?

A. That's right.

Q. I believe you said that you left the object, that you received from Mr. Chapman, which he claimed he received from Mr. Balestreri, in your home? A. Yes, sir.

Q. You put them in the china closet?

A. I mixed them immediately that afternoon with some more heroin that I had in the house. He had a sale that day for 15 ounces and he wanted to have one sack ready.

Q. You likewise mixed it with milk sugar, didn't you?

A. I added a little milk sugar, yes, sir.

Q. What does that do to heroin?

A. It dilutes it and it looks almost like the same substance. [62]

Q. The purpose is to sell it as pure heroin when in fact it is diluted heroin?

A. The purpose is to sell it, I guess, for as much

(Testimony of Harry Winkelblack.)

profit as you can make out of it, get the customers to take it.

Q. And you were selling to a number of people, were you not?

A. I was delivering for Mr. Chapman, yes.

Q. Like your trip to Reno, when you sold it to Mr. Sahati, whom you knew to be an addict, is that the fact?

A. I had heard he was. I never saw any of them use it.

Q. Did you ever use it? A. No, sir.

Q. Now, you then proceeded to San Leandro, upon receipt of the news that this box had come in is that right? A. That's correct.

Q. In the company of your wife?

A. That's right.

Q. You went to this place in San Leandro?

A. Yes, sir.

Q. You picked up the package?

A. Yes, sir.

Q. And were immediately apprehended?

A. Yes, sir.

Q. And you advised the authorities upon your apprehension that you had further narcotics at your home in Burlingame? [63]

A. That's correct.

Q. Did you tell them from whom you had received them? A. Not at that time, no, sir.

Q. When is the first time that you told them?

A. Well, it was sometime later. I couldn't say for sure. I told the State narcotics agent quite

(Testimony of Harry Winkelblack.)

awhile later and I do not remember the exact time I first told them who it came from.

Q. You were held in custody in San Leandro and the search was made of your home in Burlingame?

A. I was held in San Leandro only a few hours, two or three hours, and transferred to the Alameda County Jail.

Q. You were held in custody in Alameda County? A. Yes, sir.

Q. While you were in such custody, certain State agents made a search of your premises in Burlingame? A. That's right.

Q. You had informed them that these narcotics were there? A. Yes, sir.

Q. And did you tell them that you had picked them up in Redwood City that morning?

A. I didn't tell them at that exact time, no, sir.

Q. Did you tell them where they were?

A. I didn't pick them up in Redwood City. That was San Mateo. [64]

Q. I mean the location of the narcotics in your home. I believe you testified you told them you had it in your china closet?

A. In Burlingame, yes, sir.

Q. Is your china closet—does it have a false bottom?

A. No, it was a little china cabinet with glass doors that projected into the kitchen. I sawed the bottom shelf out of it and left them so they could be replaced without any nails.

(Testimony of Harry Winkelblack.)

Q. That is the location you told the authorities, is that right? A. That's correct.

Q. Now, those were two bundles, I believe, did you not testify this morning? A. Yes, sir.

Q. Are these the two, Exhibit 7?

A. They look like the same two, yes, sir.

Q. Which of those did Mr. Chapman tell you he received from Mr. Balestreri?

A. These were mixed before they seized them from my house, and of course, it would be in the largest package, the ten ounces, and whatever amount I had in my house, were all mixed together first and fifteen ounces measured out of the entire mixture.

Q. That was a sale you contemplated? [65]

A. Yes, sir.

Q. Did you make that sale that day?

A. No, sir, I was arrested.

Q. Were you on the way to make that sale at the time you picked up the package?

A. No, sir, I was going to pick up the big package and then return to the house and probably mix it all over again, to make it a little stronger, before I gave them the fifteen ounces.

Q. So he continued to be a customer of yours; not get just no sugar, is that right?

Mr. Riordan: I object to that on the grounds it calls for the opinion and conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Burns): Now, the container that

(Testimony of Harry Winkelblack.)

that came from in Redwood City or San Mateo, what did you do with that?

A. I probably burned it in the incinerator.

Q. But you don't have any recollection that you did?

A. I usually did after I received any package. I was instructed to burn it immediately and if it had any wrappings of any kind, to destroy it.

Q. Now, you say that your first communication to Mr. Littman or the person you were informed was Mr. Littman, was sometime in January, was that right?

A. I wrote to Mr. Littman on January 2nd and received the [66] package that I asked for on January 8th.

Q. You received that at Burlingame?

A. Mrs. Chet Wood received it at her home.

Q. And who is she?

A. She was the lady that had the apartment in the apartment house where we had just moved from. In fact, she was the only occupant at the time. Her husband worked at the airlines.

Q. After you wrote the letter of January 2nd, you had moved to Highland after, is that right?

A. Yes, sir.

Q. You were informed on or about January 8th that there was a package for you and you went and picked it up? A. That's right.

Q. You weren't in the company of Mr. Chapman then, were you? A. No, I wasn't. I was alone.

Q. You took it over to Highland after?

(Testimony of Harry Winkelblack.)

A. Yes, sir.

Q. You mixed it?

A. No, I indicated Mr. Chapman to come. I didn't know much about mixing it at that time.

Q. How long had you been with Mr. Chapman?

A. Approximately two weeks.

Q. I thought you told us that you had met Mr. Chapman in [67] October?

A. I had, but I had nothing to do with narcotics until the first of January.

Q. That's January 1 of 1951? A. Yes, sir.

Q. Were you employed on a yearly basis?

A. No, sir.

Q. But on January 2, you wrote your first communication? A. Yes, sir.

Q. At the direction of Mr. Chapman?

A. Yes, sir.

Q. And then I suppose, Mr. Winkelblack, that you disposed of that narcotics that you received on January 8th?

A. Disposed of the contents?

Q. Yes.

A. I delivered it as he instructed me.

Q. Always in his company?

A. Always and most instances, if it was in the City of San Francisco or nearby, we took two cars. He would tell me where to meet him and he would go in his car and I would be there in mine. I would be at the spot at a designated time and hand him the packages.

(Testimony of Harry Winkelblack.)

Q. And of course you didn't follow that practice when you flew to Reno?

A. I didn't deliver to Reno. I only went there to collect. [68] They came to San Mateo to pick up the narcotics.

Q. Now, you received a package on January 20th, did you not, Mr. Winkelblack?

A. Around January 20th, yes; not from Mr. Gordon or Mr. Littman, though.

Q. That was, you say, from Mr. Olivero?

A. Around the 20th of January.

Q. Had you requested that delivery to be made to you? A. Yes.

Q. And in what fashion? A. By letter.

Q. And you had been given Mr. Olivero's name by whom? A. Mr. Chapman.

Q. Do you know Mr. Olivero?

A. No, I don't.

Q. Do you know such a person as Mr. Olivero?

A. No, I did not.

Q. That was in what city, did you address that?

A. Kansas City, Missouri.

Q. How many pounds did you receive then?

A. I believe it was a full kilo.

Q. Now, a kilo is two and a half pounds?

A. Two and two-tenths pounds.

Q. Now, you received two and two-tenths pounds on January and you received eight—rather, you received two and [69] two-tenths pounds on January 8th and you received two and two-tenths on January 20th, did you not? A. Yes, sir.

(Testimony of Harry Winkelblack.)

Q. How much did you receive from Robert Reynolds in February?

A. I believe it was a half of a kilo.

Q. What would that be? One and one-tenth?

A. About seventeen ounces.

Q. You received that February 19th, did you not? A. Around that date, yes, sir.

Q. Shortly after you returned from Reno, was it not?

A. Yes, sir, I went to Reno about every week.

Q. You testified you had gone up there February 13th?

A. Yes, and I was back on the following day, on the 14th.

Q. So you received half a kilo from Mr. Reynolds in February of 1951, on February 19th, 1951, is that right?

A. I'm not sure if I received the package that time or if it was a sample that came from Mr. Reynolds.

Q. Yet you testified this morning that on February 22nd, you were in the company of Mr. Chapman and made a visit to Mr. Balestreri to try and get some narcotics, because you were expecting a shipment? A. That's right.

Q. You had received a shipment on February 19, did you not? A. That's correct. [70]

Q. And had you disposed of that in the meantime? A. Yes, sir.

Q. From whom were you expecting the shipment around February 22nd?

(Testimony of Harry Winkelblack.)

A. I wrote the letter to Mr. Littman.

Q. And did you receive a package shortly after that? A. I received it on the 23rd.

Q. Of February?

A. Yes, sir, delivered to Mrs. Eva Lewis.

Q. In San Leandro? A. Yes, sir.

Q. Now, was that package air express too?

A. I wouldn't say for sure as to how it was delivered.

Q. Did you observe as to what return address it had on it? A. No, I didn't.

Q. Do you know whether it came from Mr. Barney Gold in Chicago?

A. No, sir, I couldn't say.

Q. Do you know whether it came from Charley Schiffman? A. I couldn't definitely say.

Q. You can't say it came from Mr. Littman, can you? A. No.

Q. Now, you say you flew to Reno almost every week and, that you recall sending a post card to Mr. Littman on February [71] 13th?

A. Right.

Q. From the airport? A. Yes, sir.

Q. It is your testimony that you wrote on a post card to Mr. Littman, "Please send me a kilo of heroin?" A. That's correct.

Q. An open post card?

A. Not an open post card; a greeting card inside an envelope. I never called it a kilo or anything like that. They had their own code in the

(Testimony of Harry Winkelblack.)

letters, to send so many pounds—different ways of writing it. He told me how to say it each time.

Q. You say they had a code. Who were "they"?

A. Between Mr. Littman, Mr. Gordon, Mr. Chapman, Mr. Schiffman, whoever was supplying the narcotics on the other end.

Q. Now, about Mr. McKee and Mr. Levin?

A. Mr. McKee and Levin only bought from me, as far as I know.

Q. They only bought from you?

A. I delivered it for Mr. Chapman.

Q. They never went in together on the purchase of any narcotics?

A. Not to my knowledge. They didn't prior to my arrest, [72] let's put it that way.

Q. You have heard since your arrest, they did?

A. Only through newspapers.

Q. You haven't seen them? A. No, sir.

Q. You haven't been over to San Rafael?

A. No, sir, I haven't.

Q. Now, you say that you mailed 30 packages for Mr. Chapman, back east, is that right?

A. Yes, sir.

Q. And the contents of the packages consisted of sport shirts and money, is that right?

A. That's correct.

Q. When is the first time you mailed any package?

A. During January; around the middle of January, 1951.

(Testimony of Harry Winkelblack.)

Q. And what was in that package in the way of a garment?

A. They had three sport shirts and I don't recall the exact amount of money. I believe it was $4,000.

Q. And did you purchase the sport shirts?

A. No, I didn't. Mr. Chapman purchased the shirts.

Q. Where?

A. Harold Siegel's in Oakland.

Q. Was that the same place he told you he had purchased a sport shirt in December of 1950, after he had sold narcotics to Mr. Peccini? [73]

A. He mentioned the fact that he had paid them some money at one time and he was sending shirts in Harold Siegel's store.

Q. They had paid who some money?

A. He received some money from Joe Pitta and at that time he put it right in with some shirts in Harold Siegel's clothing store and mailed it to Mr. Littman.

Q. He told you he mailed it to Mr. Littman?

A. Yes, sir, or had the clerk in the store mail the package.

Q. He told you Mr. Peccini was there in December? A. Yes.

Q. Did he tell you at that time he knew he was a State agent?

A. He wasn't convinced that he was, no, sir.

Q. You referred to some conversation that you relate with Mr. Chapman wherein Mr. Chapman in-

(Testimony of Harry Winkelblack.)

formed you Mr. Balestreri had advised that Mr. Peccini was an agent? A. That's right.

Q. Tell us about that, Mr. Winkelblack. When was that conversation?

A. That was during the early part of January. I was riding with Mr. Chapman and he told me that he had been to San Jose and that Mr. Balestreri had told him he was quite sure that Jose Pitta was working with the Government. He didn't know [74] who the other fellow was, only by the name of Mike, but they weren't certain yet. He wouldn't believe it, because he had known Joe Pitta for many years.

Q. When did Mr. Chapman tell you this conversation with Mr. Balestreri occurred?

A. He didn't say, but I presume it to be within the two days previous to that time he told me.

Q. When he told you? A. In January.

Q. The early part of January?

A. Yes, sir.

Q. Was that before or after you had your conversation with Joe Palm?

A. That was before.

Q. And your conversation with Joe Palm was on January 8th, 1951?

A. I met Mr. Palm about that time. I never carry on any conversations with Mr. Palm.

Q. You didn't hear any conversation between Mr. Palm and Mr. Chapman, did you?

A. No, sir.

(Testimony of Harry Winkelblack.)

Q. Because Mr. Palm was in jail on January 8th, 1951, wasn't he?

A. When I saw Mr. Palm he was standing on the corner. He was out on bail, waiting for—trying to get a re-hearing, [75] whatever it was. It was the early part of January.

Q. If the indictment alleges that January 8th as the overt act in which you participated, that isn't the fact, is it?

A. I don't recall saying that definite time, January 8th, that I talked to Mr. Palm.

Q. Well, you didn't have any conversation with Mr. Palm, did you?

A. Only as an introduction. They said, "This is the fellow I have been telling you about that came from back east."

Q. Where is your home back east?

A. I lived in the southern part of Illinois.

Q. You were living in California in October of 1950, is that right? A. Yes, sir.

Q. That is when you met Mr. Chapman?

A. Yes, sir.

Q. In San Mateo? A. That's right.

Q. Now, getting back to these packages that you sent, you say that the first one was sent from Siegal's? A. The first package of shirts?

Q. That's right.

A. To the best of my knowledge, the first one was, yes, sir.

Q. You didn't make out the label on that package, did you? [76] A. No, I didn't.

(Testimony of Harry Winkelblack.)

Q. You testified this morning that you made out the label on some of these packages.

A. I have, yes, sir.

Q. Where was that done?

A. Usually at my house. I had a rented typewriter.

Q. And did you mail those packages yourself?

A. I have mailed one or two packages. I mailed one from the 29th Street Substation in San Mateo. I mailed one from the main post office in San Mateo; shirts with money in it.

Q. And you are the one that put the money in?

A. Yes.

Q. In the presence of Mr. Chapman?

A. That's correct.

Q. Each time Mr. Chapman was present?

A. Every time, yes.

Q. Now, did Mr. Chapman ever mail any packages when you weren't present?

A. He has mailed packages. I would drive him to the post office or a stationery store, near the post office, so he could have the packages wrapped and I would remain in the car.

Q. And you didn't address those packages, did you? A. No, sir.

Q. Or print the labels? [77] A. No, sir.

Q. Now, you, as we now know, met Mr. Chapman in October of 1950, but you didn't begin working for him until January of 1951, is that right?

A. That's correct.

Q. And you received two packages or four and

(Testimony of Harry Winkelblack.)

four-tenths ounces of heroin during the month of January, is that right?

A. I believe that's right.

Q. And you were the one that made the deliveries of those?

A. I delivered it where he had told me, wherever he instructed me, yes, sir.

Q. You are the one that measured?

A. I did.

Q. You are the one that diluted?

A. Yes, sir, sometimes with his assistance in my home or Mr. Chapman's.

Q. Now, you didn't see Mr. Balestreri any time during January? A. No, sir.

Q. But you had heard some mention of Mr. Balestreri from Mr. Chapman? A. That's right.

Q. And Mr. Chapman indicated to you that he had been to San Jose and he had a conversation with Mr. Balestreri with relation to the identity of Mr. Pitta and Mr. Peccini, is that right? [78]

A. Yes, sir.

Q. The first time you went to San Jose was sometime in February? A. I believe the 1st.

Q. February the 1st. A. Yes, 1st or 2nd.

Q. And you went to where in San Jose?

A. Palm's Bar on First Avenue. We drove there first. We went to the Hawaiian Shack too, and he inquired there if they knew where he was. I don't know—I am not familiar with San Jose.

Q. And you didn't find Mr. Balestreri in San Jose? A. No.

(Testimony of Harry Winkelblack.)

Q. Then you drove where?

A. We drove to a farm. He had some difficulty in finding the place and it was night then.

Q. What time of night?

A. Around ten or ten-thirty.

Q. What time did you arrive in San Jose?

A. About eight-thirty, nine o'clock.

Q. Did Mr. Chapman tell you he previously had no difficulty in finding Mr. Balestreri?

A. * * *

Q. He didn't say that?

A. No, he thought he knew where to find him, but he had some [79] difficulty.

Q. You went out to the farm? A. Yes, sir.

Q. And you didn't talk to Mr. Balestreri?

A. No, I did not.

Q. Will you tell the ladies and gentlemen in which direction from San Jose this farm is located?

A. No, I can't tell you from this building.

Q. Can you tell us what distance you covered?

A. Well, it took fifteen or twenty minutes before we found the place.

Q. Did you go to any other place besides the Hawaiian Club?

A. Went to Tom's Bar, the Hawaiian Club and to a residence in San Jose where he thought he might be.

Q. Did he get out of the car at the residence?

A. No, he didn't. He looked to see if the car was there and he said, "He must not be here either."

Q. That was at nine o'clock in February of 1951?

A. That's correct.

(Testimony of Harry Winkelblack.)

Q. The car wasn't there?

A. The car wasn't near this residence where he had expected it might be.

Q. Was there a garage at that residence?

A. Not that I saw.

Q. You don't know? [80] A. No, I don't.

Q. So you went out to the farm, and how long were you there?

A. Approximately 30 minutes.

Q. You stayed in the automobile?

A. Yes, sir.

Q. And I believe you testified that Mr. Balestreri and Mr. Chapman talked on the porch?

A. That's correct, when he came out.

Q. I believe you testified that you returned there the next day, is that right?

A. Not to the farm, no; to San Jose, to the Chinese Supermarket.

Q. Where is that located?

A. On Fourth Street, near Bayshore, out in that direction.

Q. And you didn't see what transpired between Mr. Balestreri and Mr. Chapman? You were standing in the window of the supermarket, is that right?

A. I only saw that he got in the car and came back in a few minutes and produced a package when he returned and put it on the floor of my car.

Q. Now, the next time was in February, is that right?

A. Well, that was February, the first time.

Q. The first time?

(Testimony of Harry Winkelblack.)

A. The next time was on February 22, at Redwood City, at [81] a filling station.

Q. That was three days after you had received the shipment from Mr. Reynolds?

A. That's correct.

Q. And then you again saw him when?

A. I believe it was around the 1st—no. The next time was about the 25th or 26th of February, near the Ben Franklin Hotel.

Q. And when after that did you next see him?

A. About the 1st of March, thereabouts.

Q. And that was where?

A. That was in San Jose, also.

Q. Where did you see him next?

A. At the Chinese supermarket, again on March 15th, the day he lost the ring.

Q. You also recall that because it was income tax day? A. That's right.

Q. Had you filed your income tax return by that time?

Mr. Riordan: I object to that as incompetent, irrelevant and immaterial.

Mr. Burns: I am testing the credibility of this witness. He said he knows March 15th was tax day.

The Court: I guess everybody knows that.

Mr. Burns: Not if it is withheld.

The Court: Well, if you consider it is important, I will [82] allow the witness to answer.

Q. (By Mr. Burns): You then saw Mr. Balestreri when?

A. On the morning of my arrest, March 23rd.

(Testimony of Harry Winkelblack.)

Q. March 23rd at about nine to ten o'clock?

A. That's right.

Q. In San Mateo? A. Yes.

Q. Now, on none of these occasions did you speak to Mr. Balestreri? A. No, sir.

Q. On none of these occasions did you hear any conversation between Mr. Balestreri and Mr. Chapman?

A. Only the few words that I mentioned that time, at the rural residence, that he would see him the following day and pick it up, I believe he said.

Q. Did Mr. Chapman have any other business?

A. He worked part time a little with a roofing concern.

Q. And in what capacity?

A. I think he was a salesman.

Q. He was selling roofing, isn't that right?

A. Yes, but he didn't do too much of that work after I knew him, at least.

Q. Insofar as you knew?

A. That's correct.

Q. How many hours a day would you say you spent with [83] Mr. Chapman?

A. Well, there would be no way of averaging that, but I saw him practically every day. Sometimes I would be with him all day, and the next day, maybe only five minutes, if he had nothing for me to do. I was working part time landscaping.

Q. And where was that? Down the peninsula?

A. Hillsborough.

Q. Now, going back to February 22nd and Feb-

(Testimony of Harry Winkelblack.)

ruary 23rd, I believe you testified you saw Mr. Balestreri either on both those days or just one, is that right? A. Just one day.

Q. What day was that?

A. On the evening of the 22nd, Washington's Birthday.

Q. You say the evening; what time?

A. That was around nine o'clock. I know it was quite dark. I also recall an incident that night. I think the Alka-Seltzer program came on immediately after Mr. Chapman came, because I had on the car radio and he was mimicking the sponsor, and I recall that night very distinctly.

Q. This was about nine o'clock on February 22nd? A. Yes, sir.

Q. Now, the meeting on February 1st was in the evening, is that right?

A. February 1st, yes, sir. [84]

Q. And the meeting on February 2nd was in the day time? A. That's right.

Q. The meeting on February 22nd was at night?

A. That's right.

Q. Can you tell us on March 1st, the meeting on March 1st, whether it was day or night?

A. It was night also.

Q. And March 15th?

A. March 15th was day.

Q. And March 23rd?

A. That was in the morning.

Q. And on none of these occasions, other than

(Testimony of Harry Winkelblack.)

the first one, did you overhear any conversation between Mr. Chapman and Mr. Balestreri?

A. No, sir, I did not.

Q. I think you have already testified that you yourself never spoke to Mr. Balestreri?

A. No, I didn't.

Q. Now, you saw Mr. Balestreri on February 1 and February 2, then on February 4 and you also saw Mr. Levin and Mr. McKee, did you not?

A. I don't recall the exact day. It was on Sunday morning around the early part of February, I know, that I first met McKee and Levin.

Q. Where was that? [85]

A. Across from the post office in San Mateo, between Second and Third Avenue.

Q. Were you ever to their place in San Francisco?

A. I have been to Mr. Levin's residence in front. I never was to his place on Hyde Street where he lived.

Q. The 2700 block on Hyde?

A. I don't remember. It was down towards the wharf and his house was only about six feet away from the curb.

Q. And have you ever been to Mr. McKee's place of residence?

A. No, I haven't. I met Mr. McKee at 19th and Irving, at Kelly's bar, each time.

Q. And you didn't know him before Mr. Chapman introduced you? A. No, sir.

Q. Now, personally, you have met Mr. McKee

(Testimony of Harry Winkelblack.)

and Mr. Levin, is that right? A. Yes, sir.

Q. You have never met Mr. Littman?

A. No, sir.

Q. You never talked with Mr. Littman?

A. No, sir.

Q. And you have never met Mr. Balestreri?

A. No, sir.

Q. And you have never talked with Mr. Balestreri? A. No, sir. [86]

Mr. Burns: That's all.

(Whereupon the witness was examined on redirect examination by Mr. Riordan.)

* * *

Recross-Examination

By Mr. Burns:

Q. When is the first time you saw this red convertible, Mr. Winkelblack?

A. I believe that was the first occasion that I did see it.

Q. What date was that?

A. That was around the first part of March.

Q. Of 1951? A. 1951.

Q. You say that when you drove down there in February of 1951, Mr. Chapman assumed that Mr. Balestreri wasn't at his residence, because there was no car, is that right? A. That's correct.

Q. Did you observe a car out at the ranch?

A. No, I did not.

Q. Did you observe a garage out at the ranch?

(Testimony of Harry Winkelblack.)

A. I didn't pay any attention. I don't recall seeing a garage there either.

Q. The first time you saw this red convertible, was March 15th, is that right?

A. That's correct. I don't recall seeing the same car before or after. [87]

Q. What kind of a car did you see on February 2nd? A. It was a sedan.

Q. What kind?

A. I believe it was an Oldsmobile. I couldn't say exactly.

Q. You don't recall the color?

A. It was a late model.

Q. You don't recall the color?

A. No, I don't. It was a common color.

Q. What type of automobile did you observe on February 2nd? A. It was also a sedan.

Q. On February 22nd?

A. That was at night in Redwood City and he parked the car and walked approximately eight blocks, I guess. You couldn't see the car. He walked up towards the service station, from the side street.

Q. And you, Mr. Winkelblack, are assuming that he had a car with him?

A. Yes, I am assuming, on February 22nd.

Q. All you saw was Mr. Balestreri or someone you were told was Mr. Balestreri, walking?

A. That's correct.

Q. And you don't know whether he was in a car or was not in a car? A. No, I don't.

Q. The first time you saw him in February, he

(Testimony of Harry Winkelblack.)

was in a sedan? [88] A. That's correct.

Q. An Oldsmobile?

A. I wouldn't say if it was an Oldsmobile. It looked like a General Motors product.

Q. On March 1st, you saw him in the red convertible? A. Yes, sir.

Q. What kind of a car did you see him in on March 15th?

A. That was a sedan again. It looked like the same sedan I saw him in.

Q. And on March 23rd?

A. I didn't see his car on that morning either. He was walking again on the block by Andrew Williams' store.

Q. So you don't know how he proceeded to that meeting, if he proceeded at all, do you?

A. No, I don't.

Q. Do you know of anyone else in San Jose who is in the narcotics business?

A. In the narcotics business?

Q. Yes. A. Through others, yes.

Q. Can you name one or two of them?

A. I don't know their actual names. He did business with another fellow in San Jose, yes.

Q. Has that man been convicted?

A. I believe his name was Nani. I don't know the correct [89] name.

Q. Have you ever heard of the name of Pete down there? A. Pete?

Q. Hayward Gardens.

A. I have heard of him, yes, sir.

(Testimony of Harry Winkelblack.)

Q. Do you know who he is? A. No, sir.

Q. Have you ever seen him?

A. I believe I saw him, yes.

Q. How old a man is he?

A. He was in his middle 40's, if it is the correct man.

Q. Have you been shown pictures of him?

A. No, sir.

Q. Now, you say that the only person to whom you ever addressed any communication was to Mr. Littman, is that right?

A. No, sir, I didn't say that. The ones that came from New York, the only letters I addressed were to Mr. Littman. I also addressed to Mr. Olivero and Mr. Reynolds.

Q. But nothing to no one in Chicago?

A. No, sir.

Q. So you addressed communications at the request of Mr. Chapman to Mr. Reynolds and to Mr. Olivero, is that right? A. That's correct.

Q. You don't know either of those persons? [90]

A. No, sir.

Mr. Burns: That is all.

Mr. Riordan: No further questions.

(Whereupon an adjournment was taken until Wednesday, August 19, 1953, at 10:00 o'clock A.M.) [91]

August 19, 1953—10:00 o'Clock A.M.

* * *

August 20, 1953—9:30 o'Clock A.M.

ABRAHAM CHAPULOWITZ

a witness called on behalf of the defendants, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

A. Abraham Chapulowitz.

Direct Examination

By Mr. Burns:

Q. You are also known as Abe Chapman, are you not? A. Yes.

Q. And you are presently in custody?

A. Yes.

Q. Confined to Alcatraz Penitentiary, is that right? A. That is right.

Q. That is in connection with a narcotics offense? A. That is right.

Q. You have suffered previous convictions of felonies, have you not, Mr. Chapman? [92]

A. That is right.

Q. Do you know the defendant, Joseph Littman?

A. Never saw him.

Q. You don't recognize him in this court room?

A. I don't know the man.

Q. Have you ever talked to him on the telephone? A. No, sir.

Q. Directing your attention specifically to the month of April, 1951, did you have occasion to call Mr. Littman or receive a call from him at the Buena Vista Bar located at Hyde and Beach Streets, San

(Testimony of Abraham Chapulowitz.)

Francisco, California? A. No, sir.

Q. Do you know the defendant, Mario Balestreri? A. That's right.

Q. For what period have you known him?

A. I didn't understand.

Q. How long have you known Mr. Balestreri?

A. Oh, about twenty years, I think.

Q. You first met Mr. Balestreri in jail, is that right?

A. That's right, when he was operated.

Mr. Riordan: I didn't hear the last.

A. When he was operated for ulcers.

Mr. Riordan: Are you able to hear? Will you read that, Mr. Reporter?

(Answer read by the reporter.) [93]

A Juror: Your Honor, we can't hear the witness.

The Court: Did you hear any of the testimony?

A Juror: Barely, and the last we missed a lot of it.

The Court: Read the testimony of the witness thus far.

(Testimony read by the reporter.)

Q. (By Mr. Burns): Mr. Chapman, would you kindly keep your voice up so that the ladies and gentlemen of the jury can hear you?

A. All right.

Q. You say you met Mr. Balestreri in jail some twenty years ago, is that right?

A. That's right, about twenty.

(Testimony of Abraham Chapulowitz.)

Q. Directing your attention, Mr. Chapman, to the year 1950, and the latter portion of that year, where were you residing?

A. I was in—Can I explain?

Q. Just tell me, what was your address? Where were you living in 1950, the latter portion? In San Mateo?

A. Either Daly City or San Mateo. I can't recall exactly. I think in San Mateo. I was living before in Daly City.

Q. You were married? A. Yes.

Q. And what was your wife's name?

A. Joy.

Q. Did you have any children?

A. No. [94]

Q. What was the address in San Mateo where you were living? A. 124 29th Avenue.

Q. Do you know Charles Schiffman?

A. Yes, sir.

Q. For what period of time have you known him? A. About twenty years.

Q. Did you have occasion in the year of 1950 to go to New York with your wife? A. I did.

Q. When was that?

A. Well, I can't remember the date exactly. Can't exactly remember the month. I went to New York with my wife. She wanted to see her father and I wanted to see my uncle.

Q. Did you on that occasion see Mr. Schiffman?

A. I did call him and I met him in the hotel and I talked to him.

(Testimony of Abraham Chapulowitz.)

Q. I show you Plaintiff's Exhibit 14 and ask you if you recognize that handwriting?

A. That is my handwriting.

Q. That is your address, is it not?

A. That is right. 124 29th Avenue.

Q. And the telephone number, are you familiar with that telephone number that appears to be there, a Juno number? A. I can't remember.

Q. Do you on that occasion of your visit to New York recall [95] giving your address to Mr. Schiffman in San Mateo, California?

A. I did give him my telephone number and my address.

Q. And your address? A. That's right.

Q. And in that period what business were you in, Mr. Chapman, if any?

A. Roofing and siding business.

Q. Roofing and siding business, is that right?

A. Yes.

Q. Now, did you, during the year 1950 have occasion to see Mario Balestreri? A. I did.

Q. Where was that? A. Early part.

Q. What?

A. That was early 1950. We was canvassing in San Jose, Santa Clara, Sunnyville, all over, me and a fellow by the name of King and his son. We was making—we were selling roof. We sold a lot of roofing, and we couldn't get the okay of the inspector. Some of the property was in bad shape and they wouldn't approve it.

Q. Well, Mr. Chapman, you were in the roofing

(Testimony of Abraham Chapulowitz.)

and siding business, is that right? A. Yes.

Q. And in the course of that business you saw Mr. Balestreri, [96] is that correct?

A. I did a few times, early in 1950.

Q. Did you and your wife ever visit Mr. and Mrs. Balestreri? A. A few times.

Q. Where was that?

A. I even went—I was invited to—in 1949, this was. You see, my wife, we were strangers like we didn't know too many people. I know Mr. Balestreri's wife, so we went over, was invited for Thanksgiving dinner over there and stopped that time on the way back.

Q. That was Thanksgiving of 1949, is that right?

A. Yes.

Q. Where were they living? A. Who?

Q. Mr. and Mrs. Balestreri.

A. They lived in San Jose.

Q. They were not living on a farm, were they?

A. No.

Q. How many times did you say you saw Mr. and Mrs. Balestreri during the year 1950?

A. I would say a few times. That is early 1950.

Q. Early in the year 1950? A. 1950.

Q. Do you know Harry Winkleblack?

A. Yes, sir. [97]

Q. When did you first know him?

A. Around, I believe, around January—January or December in 1951.

Q. December of 1950 or January of 1951, is that right?

(Testimony of Abraham Chapulowitz.)

A. Between them two months. I can't exactly remember the date.

Q. Did you ever introduce Mr. Harry Winkleblack to Mario Balestreri? A. No, sir.

Q. Were you ever in the company of Mr. Balestreri and Mr. Winkleblack at the same time?

A. No, sir.

Q. Did you, Mr. Chapman, at any time during the year 1950 or 1951 either purchase or sell narcotics to Mario Balestreri? A. No, sir.

Q. Did you ever advise Mr. Winkleblack that you were purchasing or selling narcotics to Mr. Balestreri? A. No, sir.

Q. Now, directing your attention specifically to the year 1951, Mr. Chapman, February 1st, did you have occasion in the company of Mr. Winkleblack to look for Mr. Balestreri in Tom's Bar in San Jose?

A. No, sir. I never even been in Tom's Bar even to see Balestreri. I didn't see Balestreri for a long time since after I put on the foundation. That must have been about between [98] seven or ten months before I met Winkleblack.

Q. Directing your attention again to February 1st, 1951, did you have occasion to look for Mr. Balestreri at the Hawaiian Gardens in San Jose?

A. No, sir.

Q. Did you have occasion to drive in the company of Mr. Winkleblack on February 1st, 1951, to the residence of Mr. and Mrs. Balestreri in San Jose? A. No, sir.

(Testimony of Abraham Chapulowitz.)

Q. Did you have occasion on that date, and at approximately ten o'clock p.m., to drive to a farm in San Jose? A. No, sir.

Q. Did you have any conversation with Mr. Balestreri——

A. (Interposing): I didn't even know where the farm is. I never did.

Q. Did you on February 2nd——

Mr. Riordan: Just a moment. Read the last answer, please.

(Answer read by the reporter.)

Q. (By Mr. Burns): Did you on the following day, February 2nd, meet by pre-arrangement with Mr. Balestreri at a supermarket in San Jose?

A. No, sir.

Q. Mr. Chapman, was there any time during the month of February or March, 1951, that you either negotiated the sale [99] or negotiated a purchase of any heroin for Mr. Balestreri? A. No, sir.

Q. I show you what purports to be a—I shouldn't say "purports." It is an exhibit in this case. I show you this exhibit, Mr. Chapman, and ask you if you have ever seen that before. A. I did.

Q. And in whose possession?

A. What do you mean, whose possession?

Q. Where did you see it? A. I got it.

Q. Where did you get it? A. I can't——

The Court: Speak up.

A. I can't answer that. I will incriminate myself.

(Testimony of Abraham Chapulowitz.)

Mr. Riordan: Are you taking a constitutional now?

Mr. Burns: Pardon me, could I address your Honor in reference to this matter?

The Court: Read that question and answer.

(Question and answer read by the reporter.)

Mr. Burns: I will withdraw the question.

The Court: What are you going to do about that?

Mr. Burns: I will withdraw the question. So the record may be clear about it, the record should show I have shown the [100] witness the pair of scales which are part of Exhibit 8. Is that right?

Mr. Riordan: That's right.

Mr. Burns: And I will withdraw the question and ask this question of Mr. Chapman:

Q. (By Mr. Burns): You have said you have seen those scales before, and I will ask you now, did you receive those scales from Mario Balestreri?

A. No, sir.

Q. Did you ever see those scales in the possession of Harry Winkleblack? A. I did.

Q. Where? A. In his home.

Q. I beg your pardon? A. In his house.

Q. Where was that house?

A. Burlingame.

Q. In Burlingame? A. In Burlingame.

Q. Directing your attention to March 23rd, 1951, Mr. Chapman, in the a.m. hours of that day, did

(Testimony of Abraham Chapulowitz.)

you have occasion to see Mario Balestreri in San Mateo? A. No, sir.

Q. At the Andrew Williams store? [101]

A. No, sir.

Q. Did you either negotiate the sale or negotiate the purchase of any narcotics from Mr. Balestreri on that day? A. No, sir.

Q. Now, Mr. Chapman, you were detained by the authorities on that day in Burlingame, were you not?

A. I think it was. I couldn't remember exactly the date.

Q. If I refresh your recollection by telling you that was the date that Mr. Winkleblack was arrested in San Leandro, would that refresh your recollection that you were—— A. Yes.

Q. ——detained——

A. I was in custody that afternoon.

Q. In Burlingame, California?

A. That is right.

Q. And you were taken into custody at the home of Mr. Harry Winkleblack, is that right?

A. That is right.

Q. Now, Mr. Chapman, you know Mr. Balestreri, do you not?

A. I do know Mr. Balestreri, that is right.

Q. Do you know his wife, Mrs. Balestreri?

A. Yes.

Q. You say you don't know nor have you ever seen the defendant, Joseph Littman?

A. Never did. [102]

(Testimony of Abraham Chapulowitz.)

Q. Did you ever address any letters to the defendant, Littman?

A. I addressed no letters. When I addressed, I wrote to Charley Schiffman, I used to send presents to Charlie in Joe Littman's name.

Q. I show you here some sport shirts, Mr. Chapman, being Plaintiff's Exhibit 12, and ask you if you can recognize those garments?

A. Looks like some shirts I sent.

Q. It looks like shirts similar to those you sent, is that right? A. That is right.

Q. And how did you address it?

A. I addressed it to Mr. Littman, and also put in the place to give it to Charlie Schiffman.

Q. Who furnished you with the address of Mr. Littman?

A. Charlie, in New York. I will explain. Mr. Schiffman was upon conditional release, and when I said would I send him a present, and he didn't want me, you know, not to send it to his home in case anything, I shouldn't put them in the middle. He said, "You can send it to this address," to make the arrangement.

Q. And he gave you the address of Joseph Littman, in Patterson, New Jersey, is that right?

A. That is right.

Q. Mr. Chapman, you were arrested in April of 1951, is that correct? [103]

A. That's right.

Q. And placed in custody? A. Yes.

Q. You have been in custody ever since?

(Testimony of Abraham Chapulowitz.)

A. That is right.

Q. After your arrest did you have occasion to instruct your wife to go to New York and look for Charlie Schiffman?

A. When I was arrested——

The Court: Can't you answer yes or no?

A. Yes. Yes. I am sorry, your Honor.

Q. (By Mr. Burns): And what instructions did you give to your wife, if any, with reference to how she should locate Mr. Schiffman?

A. I gave her Schiffman's address and I gave her Mr. Littman's. I said, "If you can't find him over there, call him, this is a friend of Charlie's, and have Charlie come to see you."

Q. And you furnished the address of Mr. Joseph Littman in Patterson, New Jersey, to your former wife, Joy Chapman? A. That is right.

Q. Now, Mr. Chapman, as you say, you were arrested in April of 1951 in connection with violation of the narcotic laws, is that right?

A. That is right.

Q. And you were engaged in the narcotic traffic with Harry Winkleblack, is that correct? [104]

A. No, sir.

Q. To whom did you sell narcotics or from whom did you receive narcotics in San Jose?

A. I can't answer that question. I will incriminate myself.

The Court: I can't hear and neither can the Jury.

(Testimony of Abraham Chapulowitz.)

A. I can't answer that question on account of I will incriminate myself.

Mr. Riordan: Would you read the question, the last two or three questions and answers?

(Whereupon portion of testimony read by the Reporter.)

The Court: What do you want to do about that?

Mr. Burns: I want to do this about it, your Honor, and I am very earnest about this matter: Mr. Balestreri is on trial on a very serious charge. I think we are entitled to produce whatever evidence we can produce concerning his innocence.

The Court: Well, you have asked a question of a witness that you have produced that requires him to testify on a subject—The question implies he had narcotic transactions with someone in San Jose.

Mr. Burns: That is correct.

The Court: He refuses to answer the question on the ground it would incriminate him. Of course it doesn't take any great legal acumen to determine that question. Whether he is a convicted felon or not he still has the right to refuse to [105-106] answer questions that would involve him in some other crime.

Mr. Burns: It isn't our purpose to incriminate him or degrade him, you understand that, your Honor.

The Court: I understand. He has refused to answer your question and I will have to sustain his right to refuse to answer that question.

(Testimony of Abraham Chapulowitz.)

Mr. Burns: I understand.

The Court: Whether he is a witness in this case or not.

Mr. Burns: I will withdraw the question, and ask you again, Mr. Chapman:

Q. Did you at any time in San Jose or any place else ever sell or purchase from Mario Balestreri any narcotics? A. No, sir.

Mr. Riordan: I object to that as having been asked and answered.

The Court: Well, he answered it again.

Q. (By Mr. Burns): Your answer was——

The Court: Was "No."

Q. (By Mr. Burns): Did you in the town of San Jose or some other place purchase or sell narcotics?

Mr. Riordan: I object to that.

The Witness: I am going——

Mr. Riordan (Interposing): Outside the scope of the case. Incompetent, irrelevant and immaterial.

Mr. Burns: I should say it isn't, with reference to this [107] matter. That question can be answered without incriminating himself.

The Court: Well, I will sustain the objection. It is a question that has nothing to do with the matter you have been inquiring about. You asked the witness whether or not he had a transaction with the defendant and he said no. It doesn't have anything to do with it to develop the fact that he had a transaction some place else.

Mr. Burns: Well, it may, your Honor.

(Testimony of Abraham Chapulowitz.)

The Court: Sustain the objection.

Mr. Burns: That is all, Mr. Chapman.

The Court: Do you wish to take a recess?

Mr. Riordan: Recess, your Honor?

The Court: Ladies and gentlemen, we will take the morning recess.

(Short recess.)

Cross-Examination

By Mr. Riordan:

Q. Mr. Chapman, you said you have been convicted before of violation of the Narcotic Acts, is that correct? A. That is right.

Q. And you were convicted in Chicago, Illinois, in 1930 for violation of the Harrison Narcotic Act?

A. That is right. [108]

Q. Sentenced to eight years?

A. That is right.

Q. And you were convicted in 1938 in New Orleans of violating the Federal Narcotics Act?

A. That is right.

Q. Sentenced to four years?

A. That is right.

Q. You were convicted in 1940 in Texas for violation of the Narcotic Laws?

A. That is right.

Q. And sentenced to eight years?

A. That is right.

Q. Then you were convicted here in San Francisco for violation of the Narcotic Laws?

(Testimony of Abraham Chapulowitz.)

A. That is right.

Q. And you are serving a fifteen year sentence?

A. That is right.

Q. At the time you were convicted in 1951 for violation of the Narcotic Laws here in San Francisco you were a parolee, is that correct?

A. Not a—on probation.

Q. You were on probation?

A. I was on conditional release.

Q. That was a conditional release from Fort Worth, Texas?

A. That is probation. And I pled guilty in the Court. I [109] wasn't tried. I was guilty and I pled guilty.

Q. That was here you pled guilty?

A. Yes.

Q. In San Francisco, before Judge Goodman?

A. No, sir.

Q. Judge Murphy? A. Judge Murphy.

Q. In the United States District Court for this district? A. That is right.

Q. By the way, you were represented by an attorney, though, at that time? At the time you pled guilty here in San Francisco in 1951 for conspiring to violate the Narcotic Laws you had an attorney?

A. Yes, sir.

Q. You weren't tried? You pleaded guilty to the conspiracy charge, is that correct?

A. I pleaded guilty. I was guilty and I pleaded guilty.

Q. You were guilty and you pleaded guilty?

(Testimony of Abraham Chapulowitz.)

A. Pleaded guilty.

Q. At the time you were convicted in Fort Worth, Texas, for violation of the Narcotic Laws in 1940, did you stand trial or did you plead guilty?

A. Stood trial.

Q. Stood trial? And that was a conspiracy to violate the Statute? [110] A. That is right.

Q. Among the conspirators was Charles Schiffman is that right? A. That is right.

Q. And one of the other of those conspirators was Earl Nettich?

A. Earl Nettich? I don't remember if he was.

Q. Was he among the conspirators that were convicted?

A. I don't believe so. I don't think so.

Q. You don't know? A. I don't think so.

Q. Did you know a man named Earl Nettich?

A. I met him in the institution.

Q. You met him how?

A. In an institution.

Q. In an institution? A. Yes.

Q. You mean a penitentiary?

A. That is right.

Q. After your conviction in Forth Worth, Texas, in 1940, you and Schiffman went to the same institution? A. Schiffman?

Q. You and Schiffman.

A. Yes. I met him at the same institution, Leavenworth.

Q. You were convicted for the same conspiracy?

A. That is right. [111]

(Testimony of Abraham Chapulowitz.)

Q. Now, did you meet Nettich in the same institution—Earl?

A. I saw him in the institution, but I don't believe he was under conspiracy in Texas.

Q. Was it under the same indictment that you were charged? A. I don't believe so.

Q. You don't believe so?

A. I don't think so.

Q. Now, you testified to sending gifts to Charles Schiffman. A. I did.

Q. What was the reason for that?

A. When I was in New York he used to send me some white shirts, underwear, and like sport-shirts—Jackman's. I used to send them to him for presents.

Q. I don't quite understand. He used to send you presents?

A. Yes. We were friends and he used to send me shirts, underwear, and I sent him some Jackman shirts.

Q. Did he send you any narcotics?

A. No, sir.

Q. Now, Mr. Chapman, you know he pleaded guilty to the same conspiracy you pleaded guilty to.

Mr. Burns: That is a misstatement of the fact.

Mr. Riordan: What?

The Court: Chapman is not named as a defendant in this suit. [112]

Q. (By Mr. Riordan): You are named as a co-conspirator in this indictment, is that right?

A. I don't think even I am indicted in it.

(Testimony of Abraham Chapulowitz.)

Mr. Burns: Well, your Honor can strike that out.

The Court: It may go out.

Q. (By Mr. Riordan): Charles Schiffman sent you presents of white shirts? A. Yes.

Q. What were they for? Just a present?

A. That is right.

Q. How many presents did he send?

A. Oh, a few.

Q. What do you mean by a few?

A. Couple of dozen.

Q. On how many occasions?

A. About three. Two or three.

Q. Two or three? And the total number of shirts being maybe a couple of dozen?

A. That's right. Also sent a lady's bag for my wife—my ex-wife.

Q. Your ex-wife? Now, you reciprocated by sending presents to Charles Schiffman?

A. I do. I always send a present.

Q. Always send a present? How many presents did you send to Schiffman? [113]

A. I couldn't remember exactly, but—I couldn't remember the number, how many presents I send him.

Q. Approximately?

A. Maybe six, maybe five, maybe more. I can't remember.

Q. Five or six different packages?

A. Shirts, yes.

(Testimony of Abraham Chapulowitz.)

Q. Is that the total number of shirts or total number of packages you sent him?

A. No, I sent a few more shirts, five or six packages—boxes.

Q. Five or six boxes?

A. I bought them and I sent them away to him.

Q. Five or six different times?

A. I will say that. [114]

Q. How many shirts in each box, generally?

A. Maybe one or two.

Q. One or two? Would there be anything else in the shirt when you mailed it? A. No, sir.

Q. Did you mail him any money?

A. No, sir.

Q. Never mailed him any money?

A. No, sir.

Q. Where did you buy the shirts?

A. Different places.

Q. Did you buy them at Bixley's in San Mateo?

A. I did.

Q. What type shirt did you send him?

A. Sport shirts.

Q. Sport shirts? What make or model? Jackman's? A. Yes, Jackman's. Gabardine shirts.

Q. Made by Jackman? A. I think so.

Q. Did you buy any shirts that you sent to Charles Littman at Siegels in Oakland?

A. To Charlie Schiffman?

Q. Yes.

A. I bought from Siegels in Oakland.

Q. On several occasions? [115]

(Testimony of Abraham Chapulowitz.)

A. On several occasions. I was buying my clothes over there.

Q. And you bought Jackman shirts to send Charles Schiffman?

A. I bought some shirts there to send Charles Schiffman.

Q. This four or five times you sent shirts as presents to Charles Schiffman, over what period of time was this? A couple of months? Three months?

A. No, not that long.

Q. Two months?

A. Maybe a couple of months or a month.

Q. A couple of months you sent these gifts to him?

A. I couldn't remember exactly the weeks or months.

Q. Maybe three months?

A. I couldn't exactly say.

Q. What was the reason for sending him five or six gifts of shirts in a period of two or three months. You were very good friends?

A. We were friends.

Q. Good friends?

A. I sent it to him for a present to give to his brother or family. He asked me, "You know, they like them shirts." I said, "Any time you want some I will send it to you."

Q. "Any time you want some, you will send them"? You addressed the packages, though, to Joseph Littman? A. You see, I explained——

(Testimony of Abraham Chapulowitz.)

The Court: No, he just wants to know whether you did. [116]

Q. (By Mr. Riordan): I am not asking for an explanation.

The Witness: I did address to Joe Littman, and I put in to please give it to Charles Schiffman.

The Court: You put in——?

A. A piece of paper, to give it to Charlie Schiffman.

The Court: You put a piece of paper in the box?

A. Yes.

Q. (By Mr. Riordan): You put a piece of paper inside the box?

A. Like a card. I put it in to please give that to Charlie Schiffman.

Q. Well, then, now did Charles Schiffman open the package or did Joe Littman? Do you happen to know who opened the packages?

A. I couldn't tell you that. I don't know.

Q. Now, did you also write letters to Charles Schiffman? A. I did.

Q. Did you write him or have someone else write him for you? A. I did myself.

Q. Well, as a matter of fact you don't write very well, do you?

A. I write the best I could.

Q. The best you could? A. Yes.

Q. A number of times you did have other people write him for you?

A. Oh, once in a while. [117]

Q. Once in a while? Now, when you mailed

(Testimony of Abraham Chapulowitz.)

these packages, did you write the address of Joseph Littman, Patterson, New Jersey, on the box for mailing? A. Sometimes I did.

Q. Sometimes? A. Yes.

Q. Most of the time you would have somebody else do it for you, wouldn't you?

A. I had the clerk where I bought the shirts to put it on.

Q. Like over at Siegels, you would have the clerk do it? A. That is right.

Q. But you would do the mailing?

A. I did.

Q. Not the store? You never asked anybody down at Bixley's to write the name on the package, did you? A. I couldn't remember that.

Q. Do you remember asking a Mr. and Mrs. Michaels to write it? A. Who?

Q. Mr. and Mrs. Michaels.

A. I don't know them.

Q. Do you know where the post office is in San Bruno, San Mateo County, California?

A. Yes, sir.

Q. You have mailed some of those packages from there? A. Yes. [118]

Q. Do you remember a little stationery store next door? A. That is right.

Q. Do you know the name of the people who owned the little business?

A. I couldn't tell you their name?

Q. You asked sometimes a lady in there and

(Testimony of Abraham Chapulowitz.)

sometimes a man to prepare your package, didn't you? A. I did.

Q. And also asked them to write on it for you the name of the addressee, Joseph Littman, Patterson, New Jersey?

A. I had them to make the package, and I took one of them slips and put on it and I sent it.

Q. Did you put the name on?

A. Most of the time I did.

Q. This was at Michael's—Oh, by the way, this store, this little stationery store, the people who ran it were man and wife called Mr. and Mrs. Michaels, does that refresh your recollection?

A. I don't know their name.

Q. But you remember going into the store?

A. That is right. Next to the post office.

Q. That's right. They would wrap the packages for you at your request. A. Yes.

Q. Is it your testimony in this little stationery store that [119] on those occasions you would write the name of Joseph Littman, Patterson, New Jersey?

A. I wrote, and once when I couldn't write it out straight, I asked him, you know, to print it.

Q. You asked him to do it once?

A. I did so.

Q. The other times you did it?

A. That is right.

Q. The only time you ever asked them to do it, once was, you say, you couldn't write straight?

A. I had it printed.

(Testimony of Abraham Chapulowitz.)

Q. Now, you were going to explain to me the reason why you sent the packages for Charles Schiffman to Joseph Littman. You said Charlie asked you to do that?

A. Absolutely, on account of his, you know, he didn't want his family, you know, to send the package—you know, when a man is on conditional release, they don't think anything—in other words, he was on conditional release and I was on parole, and he didn't want anything to happen to put us in together like I am doing anything with the man.

Q. Oh, I see. That is the reason you sent those to Charles Schiffman to pass to——

A. To Joe Littman to give to Charles Schiffman.

Q. Yes, Joe Littman to give to Charles Schiffman. A. That is right. [120]

Q. And you did that, as I understand it, because you didn't want to send packages directly to Charles Schiffman? A. That is right.

Q. Then how did you know Joseph Littman?

A. I never knew the man.

Q. You just told me you did——

A. (Interposing): I never saw the man. I don't know him.

Q. How did you know to send it to Joe Littman?

A. I told you, he told me, Charlie Schiffman in New York, and he gave me his address.

Q. Oh, you met him in New York and he told you how to send it?

A. I met Charlie Schiffman in New York at the

(Testimony of Abraham Chapulowitz.)

hotel and he told me, he said, "Any time you want to send me, send it to this address."

Q. "To this address," is the address of Joseph Littman?

A. To send it to Charlie. I sent to Joe Littman to give to Charlie.

Q. You never addressed the package "Charles Schiffman, c/o Joseph Littman," did you?

A. I don't think so.

Q. You know so?

A. I am not positive.

Q. That's right?

A. The only thing I put on was to give it to him. [121]

Q. Is that all you ever sent to Charles Schiffman was the shirts? A. That is right.

Q. You never sent anything else in it? Money?

A. No, sir.

Q. That is all you sent was shirts?

A. Shirts.

Q. What about pots and pans?

A. I sent pots and pans.

Q. You didn't send it to Joseph Littman?

A. I sent it to his sister.

Q. And they sent them back to you? Did his sister send them back to you?

A. I don't know.

Q. Did Charles Schiffman ever send the shirts back to you?

A. He sent me back—Charlie Schiffman sent me

(Testimony of Abraham Chapulowitz.)

back some shirts that were too big and I went over and changed them.

Q. You went over where and changed them?

A. Where I bought them.

Q. Where you bought them?

A. At Siegels.

Q. You took shirts back to Siegels because they were too big?

A. And I sent my father-in-law, too, shirts in New York—Mr. Butler.

Q. Now, you had—Oh, let me ask you this: Did you ever [122] talk with Mr. Burns, attorney for the defense here, prior to coming into Court.

A. What do you mean?

Q. Did you ever have a conversation with Mr. Burns prior to coming into Court today?

Mr. Burns: I will stipulate that he has, Mr. Riordan.

Mr. Riordan: Would you read the question, please.

(Question read by the reporter.)

A. Today? No.

The Court: He said prior to coming into Court.

A. I sent for Mr. Burns when I came into the county jail. I wanted him to take care of my community property.

The Court: All he asked you was, did you ever have a conversation with him.

A. Oh, I talked to him.

The Court: The answer is "yes."

(Testimony of Abraham Chapulowitz.)

Q. (By Mr. Riordan): When?

A. I saw him yesterday.

Q. Did you see him before yesterday?

A. About three weeks ago.

Q. That was before you testified in the Rogers trial? A. That's right.

Q. And you also discussed with Mr. Burns some of your personal problems, is that right? [123]

A. Yes.

Q. Community property, did you say?

A. Yes.

Q. Mr. Burns showed you Plaintiff's Exhibit 14. That is your address on the top?

A. That is right.

Q. Do you know the phone number?

A. I couldn't remember.

Q. Could it be Uncle Tom's Cabin?

A. It could.

Q. You received telephone calls in Uncle Tom's Cabin, didn't you? A. I did.

Q. You received calls from the east to Uncle Tom's Cabin? A. I think I did.

Q. In fact, you gave their telephone number, the telephone number of Uncle Tom's Cabin to Charles Schiffman? A. I did not.

Q. You didn't? Did you receive telephone calls from Charles Schiffman? A. I did.

Q. Where did you receive them?

A. Different places. Hotels. St. Francis Hotel, the telephone booth.

Q. And a bar down on Hyde Street? [124]

(Testimony of Abraham Chapulowitz.)

A. No, sir.

Q. No? A. No.

Q. Did you receive calls from Schiffman in Bondy's restaurant in Belmont?

A. I received—I received—I think I did receive some at Bondy's restaurant.

Q. How did Schiffman know where to get in touch with you?

A. I told him. I wrote him a letter to get in touch with me and phone me at that hour.

Q. He got in touch with you because you wrote a letter to Littman?

A. To Charles Schiffman, it was.

Q. You wrote it to Littman?

A. I wrote Charles Schiffman at his house.

Q. So what did you ask? For Charlie Schiffman to ring you up at a certain hour, certain date?

A. I did.

Q. Why didn't you receive it at home?

A. I didn't want to talk at home.

Q. Why? You were talking about narcotics business? A. I did not.

Q. Why? Can't you answer?

A. The only time——

Mr. Burns: I object to this argument with the witness. [125]

A. The only time I talked to Charles Schiffman is because I tried to raise some money. And I also talked to Mr. Wexler about it.

Q. That is Waxey Gordon?

A. That's right.

(Testimony of Abraham Chapulowitz.)

Q. You know the Winner's Circle, don't you? The Winner's Circle in San Mateo County? Isn't that a bar right down the street from your house?

A. Yes.

Q. Across the street from the race track? Did you receive phone calls there? A. No, sir.

Q. Did you make phone calls from there?

A. I made some.

Q. Now, you know Oliver's restaurant, don't you? A. I do.

Q. Did you receive phone calls there?

A. That's right.

Q. Were those from Charles Schiffman?

A. Pardon me?

Q. Did you receive them from Schiffman in Oliver's restaurant in South San Francisco?

A. No, sir.

Q. Who were the phone calls from? They were long distance calls? [126]

A. Some long distance from New York.

Q. Were they from Waxey Gordon?

A. That's right.

Q. Now, when you were arrested, you told your former wife to go east to see Charlie Schiffman, didn't you? A. That is right.

Q. You told her not to tell anybody? "Don't let anyone know you are going east," you told her?

A. That is right.

Q. You told her, "When you get back there to send a telegram to Joseph Littman to contact Charles Schiffman"?

(Testimony of Abraham Chapulowitz.)

A. I didn't know she sent that telegram. I gave her Charles Schiffman's address and also I gave her Mr. Littman's. I said, "If you can't find him home, you may check up his number rather directly. Call Mr. Littman and tell him you want to get in touch with Mr. Schiffman right away."

Q. You never received any of these long distance calls in your own home in San Mateo, did you?

A. A couple from Mr. Wexler, and a telegram, too.

Q. Did your former wife know you were in the narcotics business? A. Never did.

Q. You had a partnership with McKee and William Levin, is that right? A. That is right.

Q. And the nature of the partnership was for the narcotics [127] business?

A. That is right.

Q. You testified you had seen these scales before? A. I did.

Q. You gave them to Winkleblack?

A. That is right.

Q. What were they to be used for?

A. I can't answer. I would incriminate myself.

Q. Where did you get the scales?

A. I can't answer that.

Q. Why? A. I would incriminate myself.

Q. All right, did you get the scales in San Jose?

A. I did.

Q. Have you seen those blue cans before with the label; "milk sugar"? A. I think I did.

Q. Where? In Winkleblack's apartment?

(Testimony of Abraham Chapulowitz.)

A. That is right.

Q. I will show you the contents of Plaintiff's Exhibit 8 and ask you to examine that. Are the contents thereof familiar to you?

A. I can't answer that.

Q. Why? A. Incriminate myself. [128]

Q. Oh. I show you these cellophane bags. Were they used to pass narcotics?

A. I can't answer that. I will incriminate myself.

Q. Were those manila envelopes used to pass narcotics in?

A. I can't answer that. I would incriminate myself.

Q. I show you Plaintiff's Exhibit 7. Can you recognize that or identify it? You are shaking your head, so I presume your answer is no?

A. No.

Q. Did you sell narcotics to a man named Harry Weimer? A. I did.

Q. Did you sell narcotics to McKee and Levin?

A. I did not.

Q. You did not? A. I didn't sell them.

Q. Did McKee and Levin sell you any narcotics?

A. I can't answer that.

Q. Why?

A. Two wrongs don't make a right.

Mr. Riordan: Repeat the question, Mr. Reporter.

The Court: That is not an answer.

A. I can't answer that.

Q. (By Mr. Riordan): All right. That will in-

(Testimony of Abraham Chapulowitz.)

criminate you? Where did you get the narcotics you sold Weimer?

A. I can't answer that. [129]

Q. Why? A. The fifth amendment.

Q. As a matter of fact, you got the narcotics you sold to Weimer from Mario Balestreri?

A. That is not a question.

Q. Where did you get the narcotics?

A. I can't answer that.

Q. The narcotics you sold to Weimer you got in the City of San Jose? A. I did.

Q. You got it outside the Chinese supermarket on Second Avenue in San Jose, didn't you?

A. I did.

Q. You also got narcotics in the vicinity of the William Andrew's supermarket in San Mateo?

A. I did.

Q. You also got narcotics several times at the Chinese supermarket in San Jose?

A. No, sir.

Q. On one occasion?

A. One occasion. And I would say this——

Q. No. A. I am sorry.

The Court: What did he say?

(Portion of testimony read by the reporter.)

The Court: Well, he didn't say anything.

Q. (By Mr. Riordan): You also received narcotics at the gasoline station on Bayshore Highway in Redwood City? A. I did.

Q. From Mario Balestreri?

(Testimony of Abraham Chapulowitz.)

A. No, sir, never did.

Q. All right, you gave—you delivered narcotics to Mario Balestreri? A. Never did.

Q. Do you know where the Benjamin Franklin Hotel is? A. That's right.

Q. Where? A. San Mateo.

Q. You gave narcotics to Mario Balestreri there?

A. Absolutely not, and that is the truth.

Q. I should hope it is.

Mr. Burns: Your Honor, I move to strike the United States attorney's remark.

The Court: What is that?

Mr. Burns: I make a motion that the United States' attorney's remark be stricken. I don't know whether it was heard or not.

The Court: What is the record?

(Whereupon the reporter read, "I should hope it is."

The Court: Well, the jury will disregard it. [131]

Q. (By Mr. Riordan): You had narcotic dealings with Harry Winkleblack? A. I did.

Q. Harry Winkleblack delivered narcotics for you? A. He did.

Q. Harry Winkleblack wrote letters for narcotics for you? A. No, sir.

Q. Harry Winkleblack received narcotics for you? A. I refuse to answer that.

Q. Why? A. Incriminate myself.

(Testimony of Abraham Chapulowitz.)

Q. Mrs. Harry Winkleblack received narcotics for you in San Leandro?

A. I refuse to answer on incrimination.

Q. He received narcotics for you in his home in San Mateo?

A. I refuse to answer on the fifth amendment.

Q. Winkleblack did drive you to meet Balestreri?

A. No, sir, never did. I didn't see the man for near ten months before I met Winkleblack.

Q. Do you know that Winkleblack identified Mario Balestreri in Court here?

A. If he did, he is a liar, and that is the truth, and I can prove it.

Q. For whom did you buy those narcotics?

A. I can't answer that. [132]

Q. Did you borrow two thousand dollars from a man named Russell Varsi in San Mateo?

A. I did.

Q. Did you use the money to buy narcotics?

A. I can't answer that. I didn't know I can borrow $2,000.00 to buy narcotics.

Mr. Riordan: I ask that that be stricken out. It isn't responsive to the question.

The Court: It may go out.

Q. (By Mr. Riordan): What did you do with the $2,000.00?

The Court: Well, this cross-examination is getting rather far afield.

Mr. Riordan: All right, your Honor.

(Testimony of Abraham Chapulowitz.)

Q. (By Mr. Riordan): Well, let me ask you one question: Who did you give the $2,000.00 to?

A. Levin.

Q. Levin or McKee? A. Levin.

Q. Do you know a man named Joe Oliver or Joe Olivero? A. I do.

Q. And he is the brother-in-law of Mario Balestreri? A. That is right.

Q. Did you purchase narcotics from Joe Oliver?

A. Never did.

Q. Did you ask Winkleblack to write [133] letters?

A. Never did. That is the truth. The only time I saw Mr. Oliver is once when we went out for dinner. It was in 1949.

Q. Do you know Mike Peccini? A. I do.

Q. Did you sell narcotics to Mike Peccini?

A. I did.

Q. How much?

A. I think five ounces to Peccini.

Q. Five ounces? A. Yes.

Q. And you received money from Mike Peccini, is that right? A. I did.

Q. Did you know Mike Peccini was a Government agent? A. No, sir.

Q. Did you learn after you sold narcotics to him that he was a Government agent?

A. No, sir.

Q. Do you know Joe Pitta?

A. That's right.

Q. Did you sell narcotics to him?

(Testimony of Abraham Chapulowitz.)

A. I sold to both of them.

Q. Where did you get those narcotics?

A. I can't answer that.

Q. Did you get them from San Jose?

A. No, sir. [134]

Q. Did you sell narcotics to Edward Sahati?

A. I can't answer that.

Q. Woody Zaine?

A. I refuse to answer on the grounds of incrimiation.

Q. Meyers? A. (No audible response.)

Q. Do you know that Joe Olivero plead guilty to conspiracy in this case?

A. I read in the paper.

Mr. Riordan: No further questions.

Mr. Burns: I have a few questions.

Redirect Examination

By Mr. Burns:

Q. Mr. Chapman, you say that you negotiated a sale of narcotics at a supermarket in San Jose, is that correct?

A. I got the narcotics over there.

Q. You received some narcotics?

A. Yes, but I never received none from Mr. Balestreri.

Mr. Riordan: I ask that that be stricken as not responsive to the question.

The Court: It may go out.

Q. (By Mr. Burns): Was Mr. Winkleblack with you? A. He was.

Q. And in whose car were you? A. In his.

(Testimony of Abraham Chapulowitz.)

Q. What day was it? [135]

A. I think it was in February. I couldn't remember exactly the day.

Q. Do you recall that it was February 2nd, 1951?

A. It may be. I couldn't—you know, I can't explain exactly the date of it. I couldn't remember exactly the date.

Q. Do you recall, Mr. Chapman, that the evening before that you had arranged to receive those narcotics in San Jose?

Mr. Riordan: I object to that as leading the witness, your Honor.

Mr. Burns: He was going into it in his cross-examination. I just want to develop the facts. Your Honor can appreciate the position we are in.

The Court: Well——

Mr. Burns: Well, I will withdraw the question.

The Court: I don't know what you mean by that.

Q. (By Mr. Burns): Mr. Winkleblack was with you in San Jose at the supermarket when you received the narcotics, was he?

A. That is right.

Q. And to the best of your recollection it was in February, 1951, is that correct?

A. That is right.

Q. Did you have any negotiations prior to the time you received those narcotics?

A. I don't believe so.

Q. You didn't make arrangements the evening before in San Jose [136] to meet somebody at the supermarket? A. No.

(Testimony of Abraham Chapulowitz.)

Mr. Riordan: I object to this as asked and answered.

The Court: He said no.

A. No, sir.

Q. (By Mr. Burns): You didn't receive those narcotics from Mario Balestreri?

A. No, sir, Mr. Burns, and that is the truth.

Q. Mr. Riordan asked you about a filling station on Bayshore Highway in Redwood City. Did you receive narcotics there?

A. I did receive narcotics there.

Q. You didn't receive it from Mario Balestreri?

A. I never got it from Mario Balestreri. His wife was even in the car, Mr. Winkleblack's, and you can ask her.

Q. Do you recall when you received those narcotics? Was it Washington's Birthday of 1951, February 22nd?

A. I can't remember exactly the day.

Q. Do you recall what time of day?

A. It was late at night.

Q. Do you recall in the first part of February when you received narcotics at the supermarket, what time of day it was?

A. It was on a Saturday.

Q. And what time of day, Mr. Chapman?

A. It should be around afternoon of Saturday.

Q. Do you recall when it was that you saw these scales that [137] have been marked as part of Exhibit 8?

(Testimony of Abraham Chapulowitz.)

A. I think the early part of January.

Q. In January?

A. Yes. I can't remember exactly. I just want to make sure, you know. I don't know.

The Court: Just answer the question.

A. I can't remember.

Q. (By Mr. Burns): You can't remember?

A. Not exactly.

Q. You don't believe it was in March?

Mr. Riordan: I object to counsel leading the witness.

The Court: Sustained.

Q. (By Mr. Burns): Was it prior or after the time you had been to the supermarket in San Jose?

A. I think it was after.

Q. It was after? A. Yes.

Q. And you believe you were at the supermarket sometime in February? A. That's right.

Q. What time of day did you receive those scales? A. In the morning.

Q. Now, do you recall March 15th of 1951, the date that you are supposed to pay income taxes?

A. I do. [138]

Q. Were you in San Jose on that day?

A. I was in San Jose but I never did anything.

Q. Did you purchase a ring? A. I did.

Q. Where? A. From Mr. Don Levin.

Q. What time of day?

A. That was around two o'clock and from there I went to the market.

Q. On the morning of March 23rd, 1953, were

(Testimony of Abraham Chapulowitz.)

you at the Andrew Williams store in San Mateo?

A. I couldn't remember that.

Q. You don't recall? A. I can't recall.

Q. Do you recall being at the Andrew Williams store at any time?

Mr. Riordan: I object to that.

A. I do go in and buy.

Mr. Riordan: He says he can't remember it and now he is telling him to remember it.

Mr. Burns: I am not telling him to remember anything.

Q. (By Mr. Burns): Now, at any time you were in any part of San Mateo County, or any other place in the United States, in 1951 did you have any narcotic transactions with Mario Balestreri? [139]

A. No, sir, never did.

Mr. Burns: That is all.

Recross-Examination

By Mr. Riordan:

Q. Mr. Chapman, did you lose the ring you bought that day? A. I did.

Q. Did you go back to see Levin about it?

A. What?

Q. Did you go back and see Levin about it?

A. I saw his wife. Mr. Levin wasn't there when I come back.

Mr. Riordan: That is all.

Mr. Burns: That is all.

(Witness excused.)

HARRY IKEMOTO

a witness called on behalf of the defendants, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court and to the jury?

A. Harry Ikemoto.

The Clerk: Will you spell your last name?

A. I-k-e-m-o-t-o. [140]

Direct Examination

By Mr. Burns:

Q. Mr. Ikemoto, where do you reside?

A. In San Jose.

Q. For how long have you resided there?

A. In this particular residence?

Q. Yes. A. About eighteen months.

Q. Do you know the defendant, Mario Balestreri? A. Yes.

Q. How long have you known him?

A. Oh, about eight years.

Q. And where have you known him?

A. While I was in confinement.

Mr. Biordan: I didn't get the last answer.

(Answer read by the reporter.)

Q. (By Mr. Burns): That is, during the war?

A. Yes.

Q. In the relocation center for Japanese, is that right? A. Yes.

Q. Do you know Mr. Balestreri's occupation at the present time? A. Yes.

(Testimony of Harry Ikemoto.)

Q. What is it? A. Strawberry grower.

Q. Where is his farm located? [141]

A. In Santa Clara.

Q. Are you familiar with that farm?

A. Yes.

Q. In what way are you familiar with it?

A. We were in partners there at first.

Q. Where is the farm located specifically?

A. On Woodland Lane.

Q. How far from San Jose is that?

A. Oh, about ten, eleven miles.

Q. Directing your attention to February, 1951, where did you reside then, Mr. Ikemoto?

A. On the farm.

Q. And with whom were you residing?

A. My wife and boy.

Q. And that is the same farm Mr. Balestreri now operates? A. Yes.

Q. And where he now resides? A. Yes.

Q. In February, 1951, where was Mr. Balestreri residing, do you know? A. In San Jose.

Q. At a residence there? A. Yes.

Q. Directing your attention specifically to February 1st, 1951, did you have occasion to have a call from two persons [142] in the evening at that farm?

A. No.

Q. Did you see anyone at that farm?

A. No.

Q. Was Mr. Balestreri at the farm at ten o'clock that evening? A. No.

Q. Now, was Mr. Balestreri working at the

(Testimony of Harry Ikemoto.)

farm during the day? A. Yes.

Q. And every day? A. Yes.

Q. Directing your attention to February 22nd, 1951, Washington's Birthday, did you see Mr. Balestreri on that day? A. Yes.

Q. How is it impressed on your recollection that you saw him that day?

A. We were negotiating buying a tractor.

Q. Where was that? A. In Santa Clara.

Q. Where? From whom?

A. Dr. Wilcox.

Q. Will you tell the ladies and gentlemen of the jury what you mean by negotiating for the purchase of a tractor?

A. We were going to buy it. [143]

Q. How did you go about doing that, Mr. Ikemoto?

A. We brought the money with us to back it up, but he wanted cash, so we just looked at the tractor, looked the tractor over, rode around testing it out, and then come back.

Q. You were with Mr. Balestreri during all that day? A. Yes.

Q. Where is Dr. Wilcox presently located?

A. I think over on Pipe Road in Santa Clara.

Q. Did you negotiate for and finally succeed in purchasing the tractor? A. Yes.

Q. When and where? A. On the 23rd.

Q. February? A. Yes. We picked it up.

Q. During the evening of February 22nd, did you have occasion to see Mr. Balestreri?

(Testimony of Harry Ikemoto.)

A. Well, after going to this Wilcox farm, we come back and puttered around until two or three o'clock in the afternoon, then he says, "well, let's celebrate George's Birthday," so he went shopping and went home. That is about the time we parted.

Q. What time was this?

A. I would say about two or three o'clock in the afternoon.

Q. Do you know Mrs. Balestreri?

A. Yes. [144]

Q. How long have you known her?

A. About four years.

Q. Now, Mr. Balestreri and you were in partnership, is that right? A. Yes.

Q. Then he bought you out, is that right?

A. Yes.

Q. And you know of your own knowledge he has been living there and working on that farm for how long, Mr. Ikemoto?

A. On that farm?

Q. Yes. A. Living at the farm?

Q. And working?

A. Oh, I would say eighteen months or so.

Q. How long has he been working there?

A. Since the fall of 1950.

Q. And what are his hours of employment or work, do you know?

A. Well, Mr. Burns, well, between 6:30 and 7:00 to sundown.

Mr. Burns: That is all, thank you, Mr. Ikemoto.

(Testimony of Harry Ikemoto.)

Cross-Examination

By Mr. Riordan:

Q. You say you were a partner with Mario Balestreri? A. Yes.

Q. In a farming enterprise?

A. Yes. [145]

Q. When did you first become his partner?

A. Fall of 1949.

Q. 1949? A. Yes.

Q. Then you are no longer partners?

A. No.

Q. When did he buy you out?

A. I would say about eighteen months ago.

Q. From this date, you mean? A. Yes.

Mr. Riordan: No further questions.

Mr. Burns: That is all, Mr. Ikemoto, thank you.

(Witness excused.)

GEORGE KUBOTE

a witness called on behalf of the defendants, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: State your name, please.

A. George Kubote.

Direct Examination

By Mr. Burns:

Q. Mr. Kubote, where do you live?

A. I live Saratoga.

(Testimony of George Kubote.)

Q. Do you know the defendant, Mario Balestreri? A. Yes. [146]

Q. How long have you known him?

A. Since 1949.

Q. Since 1949? A. Yes, sir.

Q. You know him in a business and social way, is that right? A. Yes.

Q. Directing your attention specifically, Mr. Kubote, to Washington's Birthday, February 22nd, 1951, do you recall seeing Mr. Balestreri on that day? A. Yes, I did.

Q. Would you tell the ladies and gentlemen of the jury what time of day and where it was and with whom he was?

A. I will. We Japanese Buddist custom, especially with United States people there, every year ancestry celebrated. My wife's father, my father-in-law——

The Court: Just tell when you saw Mr. Balestreri.

Q. (By Mr. Burns): Mr. Kubote, you say there was a Japanese Buddhist custom to celebrate Ancestors' Day, is that right? A. Yes.

Q. Was that type of celebration conducted at your home that day? A. Yes.

Q. What time of day?

A. I imagine I invite for about five o'clock. Mr. Balestreri be my home about six hour between five and a half. [147]

Q. He came to your house between 5:00 and 5:30? A. Yes.

(Testimony of George Kubote.)

Q. How long was he there?

A. Well, through dinner we talk about farmers.

Q. Was Mrs. Balestreri with him?

A. Yes.

Q. He wasn't living at the farm at that time?

A. No.

Q. He was living in San Jose?

A. San Jose, yes.

Q. Mr. Ikemoto was living at the farm?

A. Yes.

Mr. Burns: Thank you very much.

Cross-Examination

By Mr. Riordan:

Q. I understand you saw Mr. Balestreri between five and five-thirty o'clock in the evening?

A. Yes.

Q. February 22nd? A. That is right.

Mr. Riordan: No further questions.

Mr. Burns: Five o'clock to eleven o'clock, Mr. Riordan.

Mr. Riordan: Five o'clock or six o'clock to eleven o'clock?

Mr. Burns: That is right.

(Witness excused.) [148]

Thursday, August 20, 1953—9:30 o'Clock A.M.

MARIO BALESTRERI

was called as a witness on behalf of the defendants, and after being sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court and to the jury?

The Witness: Mario Balestreri.

Direct Examination

By Mr. Burns:

Q. Mr. Balestreri, how old are you?

A. 52.

Q. And you are married? A. Yes, sir.

Q. What is your wife's name?

A. Delia Balestreri.

Q. Do you have children? A. Yes, sir.

Q. What are their names and ages?

A. Carl is 4½ years old and Marco is 19 months.

Q. Where do you reside?

A. At present I reside at Route 2, Box 605, Homestead Road.

Q. For what period of time have you resided there? A. Well—— [149]

Q. Approximately.

A. Well, I would say approximately now maybe twenty months.

Q. Previous to that time where did you reside?

A. 60 South Cragmont, San Jose; Alum Rock Avenue.

(Testimony of Mario Balestreri.)

Q. Alum Rock Avenue in San Jose?

A. That's right.

Q. Mr. Balestreri, you have been previously convicted of a felony, is that right?

A. Yes, sir.

Q. And more than one felony?

A. Yes, sir.

Q. Any felonies involving narcotics?

A. Yes, sir.

Q. How many?

A. Two, and after I was confined in McNeils Island I was brought back and a third was put on and I pleaded guilty to the third.

Q. When did you last get out of the penitentiary?

A. I have been out of prison now since August, 1947.

Q. What type of release are you on?

A. I am on a parole, and after the parole half of it they call it probation.

Q. And you are presently on parole?

A. I am, sir.

Q. That period has not expired? [150]

A. Well, I don't know whether that period has expired or not because I have a conditional release which is expired and a probation.

Q. Under the terms of your release are you required to make reports to the Probation Office?

A. Yes.

Q. To what office do you make those reports?

(Testimony of Mario Balestreri.)

A. United States Probation and Parole of this Court, of this building.

Q. And you mean at this office?

A. Yes, sir.

Q. When did you marry Mrs. Balestreri?

A. I married Mrs. Balestreri in November of—November 8, 1947, permission from the United States Parole and Probation Department.

Q. Do you know Joseph Littman?

A. No, sir.

Q. Except from your acquaintance with him across the counsel table?

A. Well, I mean I know Joseph Littman here, yes.

Q. But you didn't know him prior to the time of his appearance in Court? A. No, sir.

Q. Do you know Abe Chapman?

A. I do. [151]

Q. For what period have you known him?

A. Well, I have known him for quite some time. Many years.

Q. Directing your attention to the year, 1950, did you have occasion to see Mr. Chapman?

A. Yes. I have seen Mr. Chapman on a couple of occasions, like——

Q. Where? A. Well, in San Jose.

Q. Did he have occasion to visit you or did you visit him? A. Oh, no, he visited us.

Q. At your home?

A. At our home, yes, sir.

Q. Who was with him? A. Sir?

(Testimony of Mario Balestreri.)

Q. Who was with him at the time?

A. His wife was with him only.

Q. The present Mrs. Thornton?

A. Yes, if that is her name. I knew her as Mrs. Chapman.

Q. Directing your attention to February 1st, 1950, Mr. Balestreri, where were you residing?

A. February 1st?

Q. The month of February, 1951.

A. February, 1951? It was March we were arrested. February, 1951, I was residing at 60 South Cragmont.

Q. What was your occupation? [152]

A. Farmer.

Q. With whom were you a partner?

A. Harry Ikemoto.

Q. The man who just left the stand?

A. Yes.

Q. Did you on February 1st, 1951, have occasion to see Abe Chapman? A. No, sir.

Q. Do you know Harry Winkelblack?

A. No, sir.

Q. Did you see him on February 1, 1951?

A. No, sir.

Q. At San Jose? A. No, sir.

Q. At your farm or any place? A. No, sir.

Q. Did you on the morning or afternoon, or at any time the next day, visit the Chinese supermarket in San Jose? A. No, sir.

Q. Do you know where that supermarket is located?

(Testimony of Mario Balestreri.)

A. I have learned where that supermarket is three or four nights ago.

Q. After you heard Mr. Winkelblack's testimony? A. Right, sir.

Q. You did not visit that supermarket or see Mr. Chapman in [153] that place, or Mr. Winkelblack? A. No, sir.

Q. What did you do February 22nd, 1951, if anything?

A. Well, if I recall, February the 22nd, 1951, at the hour, I would say, around 7:00 A.M., I went from my home at Alum Rock to the farm, which was about thirteen miles. I drove there. We tinkered around the place for just maybe, say, an hour or two, and we left there and went to Dr. Rogers Ranch, who had a tractor for sale. Mr. Ikemoto and I took our large truck, went to this farm, and we saw there the foreman of Dr. Rogers.

Q. Well, to be a little more brief, Mr. Balestreri, did you attempt to negotiate for the purchase of the tractor?

A. Yes, sir. We had a check there for $250.00 and when we wanted to take the tractor away with us, the man in charge stated that Mr. Rogers had left——

The Court: (Interposing) It isn't responsive to the question. I only interrupt the witness because you are trying to bring out something, and they all make long speeches. That applies to the witnesses on both sides.

The Witness: I am sorry.

(Testimony of Mario Balestreri.)

The Court: What he asked was whether or not you had negotiations. Is the answer yes or no?

The Witness: Well, your Honor, does that mean did I buy it then? [154]

Q. (By Mr. Burns): Negotiate?

A. We spoke about it, yes.

Q. Well, Mr. Balestreri, you were not successful but you spent some hours, is that right?

A. Right.

Q. What did you do the balance of that day?

A. The balance of the day I worked at the farm, did some work, then I returned home.

Q. Do you recall that you saw Mr. Kubote that day?

A. Yes, sir. It was around five or six o'clock or thereabouts we went down to Mr. Kubote's home, had dinner, and stayed there, I guess until eleven, twelve, whatever it was. Very late at night.

Q. Now, in this indictment as one of the overt acts you are charged with on February 22nd having had a meeting with Mr. Chapman and Mr. Winkelblack in San Mateo County or Santa Clara County.

A. I don't know Mr. Winkelblack and have never been in San Mateo County.

Q. You have never been in San Mateo County?

A. What did you say? February?

Q. February 22nd did you see Abe Chapman?

A. No, sir.

Q. When was the last time prior to the month of February, 1951, you saw Abe Chapman? [155]

A. Oh, I don't know. Maybe a year or more.

(Testimony of Mario Balestreri.)

Q. Did you at any time negotiate the sale or purchase of narcotics from Abe Chapman or anyone during the years 1950 or 1951? A. No, sir.

Q. I show you a set of scales, Mr. Balestreri, marked Plaintiff's Exhibit 8, and ask you if you have ever seen them before?

A. Never saw them in my life.

Q. Did you have occasion to give those to Mr. Chapman at any time? A. No, sir.

Q. Did you ever visit the Andrew Williams supermarket in San Jose for the purpose of negotiating a sale of narcotics?

A. I don't know there is an Andrew Williams in San Jose, your Honor.

Q. On March 23rd did you see Abe Chapman?

A. I did not.

Q. Did you see him, Abe Chapman, or anyone with reference to Narcotics March 1st or March 15th? A. No, sir.

Q. Did you at any time in either the month of February or March, 1951, or at any other time in the year, 1951, have in your possession any heroin?

A. No, sir. [156]

Q. Did you at any time during that period conspire with Mr. Chapman, Mr. Winkelblack, or any other person, to violate the Narcotic Laws of the United States? A. No, sir.

Mr. Burns: That is all.

(Testimony of Mario Balestreri.)

Cross-Examination

By Mr. Riordan:

Q. Mr. Balestreri, do you know Tom's Bar in San Jose? A. No, sir.

Q. On Second Avenue?

A. Not a Tom's Bar on Second Street. There is no Tom's Bar on Second Avenue.

Q. There is no Tom's——

A. On Second Street, San Jose, because I checked that two nights ago.

Q. Is it on First?

A. There is a Tom's Bar at First and St. James.

Q. Is it Tommy's Bar at First and St. James?

A. Yes, sir, Tommy's.

Q. Thank you, Mr. Balestreri. You are a brother-in-law of Joe Olivero? A. Yes, sir.

Q. Who pleaded guilty to the conspiracy in this indictment? A. That I don't know.

Q. You have gone back to Kansas City, though, to see your [157] brother-in-law, Joe Olivero?

A. What is that, sir?

Q. You went back to Kansas City to see your brother-in-law, Joe Olivero?

A. 1950, by permission of the United States Probation and Parole officer.

Q. And Joe Olivero came out to San Jose to see you?

A. No, sir, not prior to 1950. Since we have seen our brother-in-law and family in December, 1950,

(Testimony of Mario Balestreri.)

we haven't seen no one of the family back there other than the sister-in-law and brother-in-law on the other side.

Q. When did you first meet Abe Chapman?

A. Well, about twenty odd years ago, I guess.

Q. Where? A. In prison.

Q. You were convicted in 1924 for violation of the Federal Narcotic Act? A. Right.

Q. Sentenced to four years in prison?

A. Correct, sir.

Q. That was in San Francisco, California?

A. Yes.

Q. Federal Court? A. Yes.

Q. Convicted again in 1929 for violation of the narcotics laws? [158] A. Yes, sir.

Q. In San Francisco? A. Right.

Q. Sentenced to twelve years? A. Correct.

Q. In 1937 you were convicted for counterfeiting? A. Correct.

Q. Served fifteen years? A. Correct.

Q. San Francisco Federal Court?

A. Yes, sir.

Q. In 1937 you were also convicted for violating the narcotic laws in the Federal Court?

A. That is when I was confined for the other, yes, sir.

Q. Sentenced to five years? A. Correct.

Q. What prison did you meet Chapman in?

A. Well, let's see, that could have been—gee, this I wouldn't know, sir, because I served time in hospitals for quite a while.

(Testimony of Mario Balestreri.)

Q. Did Chapman ever send you any presents?

A. No, sir.

Q. Did you give Chapman any?

A. No, sir.

Q. Did Chapman bring something down to your house Thanksgiving [159] and Christmas, give you a present? A. Not that I know of.

Q. Do you know Russell Varsi?

A. No, sir.

Q. Didn't he come to your home with Chapman at one time? A. No, sir.

Q. Do you know Evan Rogers?

A. No, sir.

Q. Did you ever give any presents to Abe Chapman? A. No, sir.

Q. Did you ever give any narcotics to Chapman?

A. No, sir.

Q. Chapman ever give any to you?

A. No, sir.

Mr. Riordan: No further questions.

Mr. Burns: That is all.

(Witness excused.)

Mr. Burns: Defense rests.

Mr. Riordan: The United States rests, your Honor.

[Endorsed]: Filed July 20, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this court, or true and correct copies of orders entered on the minutes of this court, in the above-entitled case, and that they constitute the record on appeal.

Indictment.

Minutes of Plea, April 10, 1952.

Verdict.

Judgment and Commitment.

Motion for New Trial and Affidavit in Support.

Order Denying Motion for New Trial.

Notice of Appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of May, 1953.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14348. United States Court of Appeals for the Ninth Circuit. Mario Balestreri, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 5, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 14348

MARIO BALESTRERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL AND DESIGNATION OF RECORD ON APPEAL

Comes now the appellant Mario Balestreri, and advises the court in his appeal from the order denying his motion of his intention to rely upon each and all of the following points, to wit:

1. That the District Court abused its discretion in denying the motion for new trial made by appellant.

Appellant designates the following portions of the record to be printed and he believes that said portions are necessary to fully support and present his appeal:

1. The indictment.

2. Reporter's transcript of the testimony of the following witnesses at the trial of said action:

(a) Government witness Harry Winkelblack.

(b) Defense witnesses Abraham Chapulowitz, Mario Balestreri, Harry Ikemoto, George Kuboto.

(c) Judgment.

3. Motion for New Trial.

4. Affidavit of James E. Burns in support of a new trial.

5. Order Denying Motion for New Trial.

6. Notice of Appeal.

Dated: May 26, 1954.

/s/ JAMES E. BURNS,
Attorney for Appellant,
Mario Balestreri.

Receipt of copy acknowledged.

[Endorsed]: Filed May 26, 1954.

No. 14,348

United States Court of Appeals
For the Ninth Circuit

MARIO BALESTRERI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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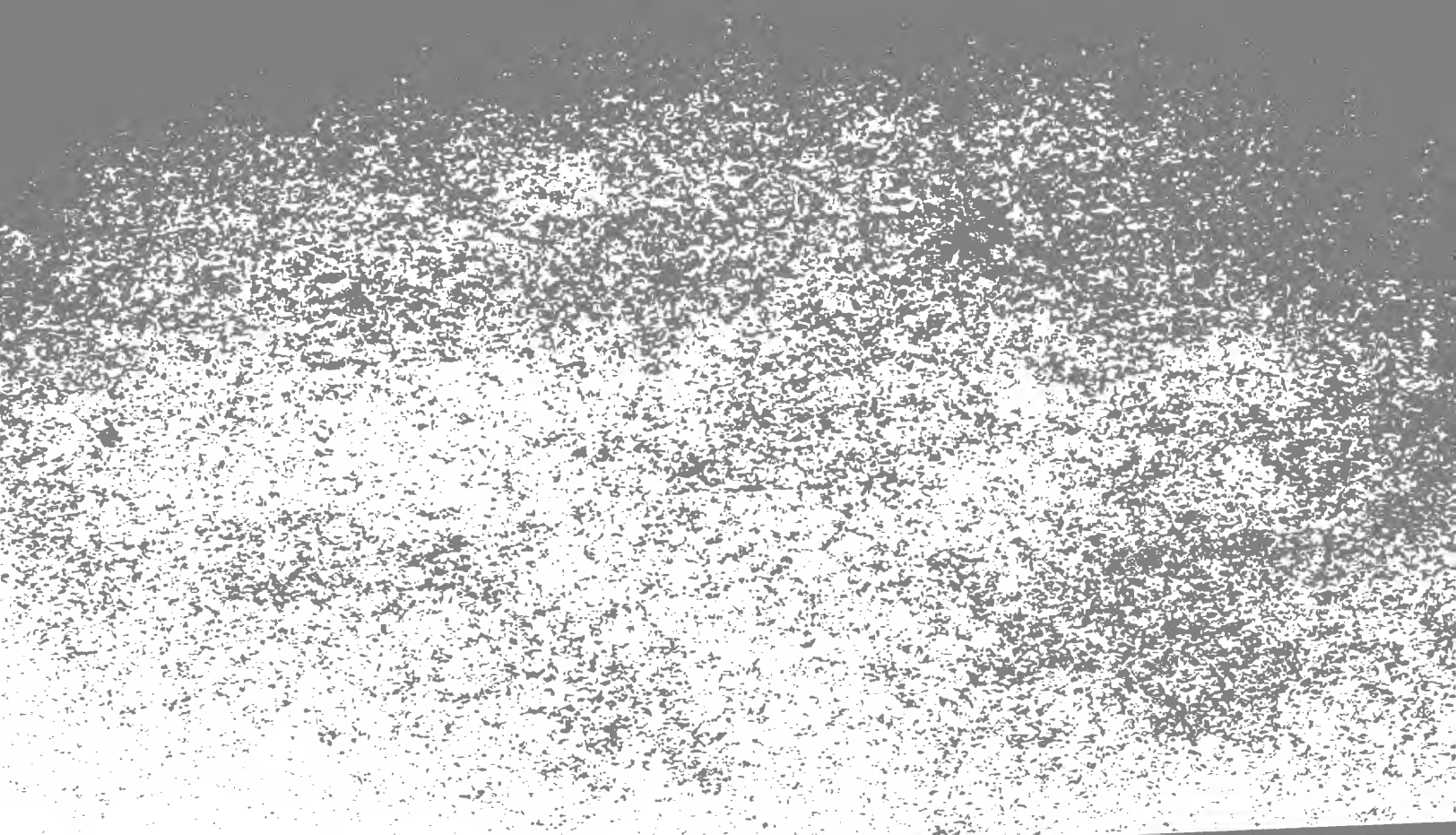

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No. 14,348

United States Court of Appeals

For the Ninth Circuit

MARIO BALESTRERI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant was found guilty by jury verdicts after trial in the United States District Court for the Northern District of California, Southern Division, of violations of the Jones-Miller Act (21 U.S.C. 174), concealment of heroin, and of Section 371 of Title 18 in that he conspired with others to violate the provisions of the so called Jones-Miller Act and the Harrison Narcotic Act (26 U.S.C. 2553 and 2557).

The indictment was in 24 counts, the defendant being charged with the substantive offense in count nine and with the conspiracy in count twenty-four. (T.R. 3-29.)

Appellant was sentenced to a term of three years' imprisonment on each count the sentences to begin and run concurrently, and to a fine of $1 on count nine. (T.R. 30-31.) Judgment was imposed September 4, 1953. No appeal was taken.

On March 11, 1954, appellant filed a motion for a new trial on the ground of newly discovered evidence. (T.R. 32-33.) An affidavit in support thereof was filed with said motion. (T.R. 33-48.) No counter-affidavit was filed. After argument, the Court, without hearing any testimony, made its order denying the motion for new trial. (T.R. 49-50.)

A timely notice of appeal was filed (T.R. 52). (Rule 37(a), Federal Rules of Criminal Procedure.) The jurisdiction of this Court to review the order of the District Court is sustained by 28 U.S.C. Sections 1291, 1294.

STATEMENT OF THE CASE.

Appellant was indicted in the United States District Court for the Northern District of California, Southern Division. The indictment was in twenty-four counts. Altogether it named twenty-three defendants and three other persons were named as coconspirators but not defendants. The twenty-fourth count charged a conspiracy to violate the narcotic laws of the United States on the part of all the defendants and the coconspirators. (T.R. 15-29.)

The ninth count is the only other count naming the defendant and he is charged therein with a viola-

tion of the Jones-Miller Act (21 U.S.C. 174) in that on or about the 23rd day of March, 1951, he concealed a certain quantity of heroin in violation of the Act. (T.R. 7-8.) Appellant entered a plea of not guilty to each of these counts, and after trial by jury was found guilty on both. (T.R. 30.) He was sentenced to three years' imprisonment on each count, the sentences to commence and run concurrently. (T.R. 31.) No appeal was taken.

Approximately six months after sentence the appellant filed a written motion for a new trial on the ground of newly discovered evidence. (T.R. 32.) The motion was supported by an affidavit of defendant's counsel setting forth the factual basis for such motion, what the newly discovered evidence was, and the inability of the defendant to have procured it at the time of his trial. (T.R. 33-48.) This affidavit, with the exhibits attached, covers 15 pages of the printed record. In summary it alleges the following:

> At the trial of the defendant the only witness testifying against him was one Harry Winkelblack; said witness was named in the indictment as a coconspirator but not a defendant; said witness testified in substance that there had been several meetings between the defendant and one of the codefendants, Abraham Chalupowitz, who pled guilty before the trial. He testified that after each of the meetings the codefendant would return to a waiting car with various quantities of narcotics.
>
> The defendant testified on his own behalf and denied the meetings and likewise testified as to

his whereabouts at the times mentioned by the government witnesses; his testimony as to his whereabouts being different than the places testified to by the witness, Harry Winkelback, was corroborated by two disinterested witnesses; the codefendant Chalupowitz was called as a defense witness and he denied the meetings or having any transactions involving narcotics with the defendant.

Approximately six months after appellant's conviction his attorney came into possession of copies of official communications of United States Bureau of Prisons. These documents were attached to and incorporated in the affidavit as Exhibits "A" and "B".

These documents show that the government witness, Winkelblack, testified under duress, promises and threats; that his testimony was biased and prejudiced against the appellant and was knowingly induced by the various agents of the United States Narcotics Bureau and a United States attorney for this district who procured the indictment of defendant.

The documents show that while the witness Winkelblack was in the custody of the United States marshal for this district for the purpose of testifying before the grand jury, he was lodged in the county jails of Solano and Contra Costa Counties, State of California; while so incarcerated and at the insistence of the prosecuting agents of the government, he was permitted to leave his place of confinement and spend weekends at home with his wife; he was permitted to be out of jail at other times; he was permitted

other liberties and privileges denied to other prisoners, including visits by his wife in private quarters without molestation by jail officials.

Said witness informed the agents of the government that if such privileges and freedom were denied him he would refuse to cooperate with the authorities or give the kind of evidence or testimony that they desired. Said witness stated that if he lost such privileges and was confined in jail as other prisoners are, he would refuse to go on with his testimony as a government witness and back out on all the promises made to agents of the government.

The witness was then threatened that in the event that he got stubborn with reference to giving the kind of testimony the government wanted that he should consider the possibility of his being prosecuted by the government for escaping jail on many counts and also the possibility of his wife being involved as harboring an escaped federal prisoner. The idea of federal prosecution on the escape charge itself so impressed the witness that the government agents did not have any fear of his backing down on his testimony.

The affidavit in support of the motion alleged that the testimony of the witness Winkelblack was false, prejudiced and biased and had been induced by agents of the Narcotics Bureau and an assistant United States attorney of this district, by the use of threats, promises and favors as set forth in the exhibits. The affidavit set forth that had such evidence been available at the trial the witness' bias and prejudice would have been established and his credibility destroyed.

No counter-affidavit was filed by the government.

The District Court, Judge Goodman, filed a written order denying the motion for new trial. (T.R. 49-51.) A timely notice of appeal was filed. (T.R. 52.)

SPECIFICATION OF ERRORS RELIED UPON.

1. That the District Court abused its discretion in denying the motion for new trial.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

The District Court abused its discretion in failing to grant appellant a new trial on the uncontroverted showing that the only witness against the appellant was biased and prejudiced in favor of the prosecution as a consequence of promises and threats made to and against him by government officials.

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2. THE MOTION FOR NEW TRIAL ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE SHOULD HAVE BEEN GRANTED AND ITS DENIAL WAS AN ABUSE OF DISCRETION.

Specifications of Error No. 1.

1. That the District Court abused its discretion in denying the motion for a new trial.

The government offered as its only witness against the appellant an ex-convict who had been previously

convicted of several felonies. (T.R. 55.) In addition he was named as a coconspirator in the present indictment; but not as a defendant. (T.R. 15.) He was not prosecuted by the federal government on any of the charges resulting in this indictment.

At the time he testified before the grand jury that returned the indictment he was serving sentences imposed by California courts for violations of the state narcotic laws. He was, however, in the custody of the United States marshal of this district pursuant to a writ of habeas corpus *ad testificandum* issued for the purposes of his attendance before the grand jury. The manner of exercising custody over him is fully set forth in the affidavits and exhibits.

A reading of these documents shows that the witness' testimony was induced by favors and promises. They likewise reveal that when he indicated he might not testify in the manner that the government officials wanted he was threatened with a possible prosecution for having escaped from federal custody. Although these promises and threats were made while he was appearing before the grand jury, the possibility of prosecution for escape existed at the time of his testimony at the trial.

That such testimony was the result of coercion, duress and inducement is not denied by the government. Neither is it denied that the evidence of such was newly discovered and could not by the exercise of due diligence been presented at the trial. Finally, it is not disputed that his testimony was false and

that the presentation of such evidence at the trial would have destroyed the credibility of this sole witness against the defendant.

Despite these apparent admissions, the trial Court denied the motion for a new trial. The denial was based on two grounds:

(1) That there was no proximate relationship shown between treatment and testimony; or

(2) Even if relationship existed such facts would be no more than impeachment and not of substance requiring the granting of the motion.

In the case of *Hamilton v. United States,* 140 F. (2d) 679 (C.A.D.C.), it was stated that an affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. The Court said that such was especially true where the sole evidence to support a conviction is the word of one witness, in that case the arresting officer.

To say that the affidavit and exhibits filed with this motion fail to show a relationship between the threats and promises and the testimony is not a fair construction of the affidavit.

It is fundamental that any witness may be impeached by proper means. One generally accepted method is to show that promises or threats have been made to or against the witness. This is especially true of accomplices. The simple reason for the rule is that there is a clear proximate relationship between the witness' testimony and what factors compelled it.

Thus, in the recent case of *Gordon v. United States,* 344 U.S. 414, 73 S.Ct. 369, the unanimous Court reversed a conviction where the trial Court unduly restricted efforts of the defense to introduce evidence of impeachment. Part of the impeaching evidence consisted of a statement made to the witness, who was an accomplice, by another judge at the time he entered a plea and his sentence was deferred. The Supreme Court made this statement, which is particularly appropriate in this case:

> "Where the Government's case in a criminal prosecution stands or falls on the jury's belief or disbelief of one witness, that witness' credibility is subject to close scrutiny."

Certainly had the information contained in the documents filed with the motion for new trial been available at the time of trial, failure to permit cross-examination thereupon would have been error.

The second reason advanced by the trial Court for denying the motion was that at most the evidence was in the nature of impeachment. Recognizing that such is the rule, it is submitted that the evidence here newly discovered is more than mere impeachment.

Here, the government's case stood or fell on the testimony of the witness Winkelblack. If evidence severely questioning his credibility or destroying it was available, the government's case would have been weakened or destroyed.

Admittedly there was no other evidence to support the conviction. In the case of *United States v. On*

Lee, 201 F. (2d) 722 (C.A. 2d), a new trial was sought on the ground of newly discovered evidence affecting the credibility of a government agent. The majority opinion held that the new evidence merely lessened his credibility and stated that even without it the other evidence was sufficient to sustain the conviction.

Judge Frank in his dissenting opinion pointed out the distinction between new evidence that is merely impeaching and that which warrants the granting of a new trial. He pointed out that where the evidence sought to be impeached is the very evidence that led to the conviction, that a new trial should be granted. He stated:

> "Surely we should grant a new trial when at such a trial that very testimony, because of newly discovered material, would not be offered by the government or, if offered, almost certainly would not be believed by the jury. For, on that basis, the new evidence would probably produce an acquittal."

It is submitted that on the facts the newly discovered material here presented is more than mere impeachment but is destructive of the government's case.

CONCLUSION.

It is submitted that the motion for new trial was meritorious and the Court abused its discretion in denying it. The evidence was newly discovered, its

discovery was diligent, it was material, was not merely cumulative or impeaching and its introduction at a new trial would probably produce an acquittal.

Dated, San Francisco, California,
October 18, 1954.

Respectfully submitted,
JAMES E. BURNS,
Attorney for Appellant.

No. 14,348

IN THE

United States Court of Appeals

For the Ninth Circuit

MARIO BALESTRERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
JOHN H. RIORDAN, JR.,
Assistant United States Attorney,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,348

IN THE

United States Court of Appeals

For the Ninth Circuit

MARIO BALESTRERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant was indicted in the United States District Court for the Northern District of California, Southern Division. The indictment was in twenty-four counts. It named twenty-three defendants, and three other persons were named as co-conspirators but not defendants. The twenty-fourth count charged a conspiracy to violate the narcotic laws of the United States on the part of all the defendants, including appellant, and the co-conspirators (T. R. 15-29).

Appellant is also charged in the ninth count of the indictment with violation of the Jones-Miller Act (21 U.S.C. 174).

Appellant entered a plea of not guilty to each of these counts, and a jury trial was commenced on August 17, 1953. The trial consumed a period of five days during which the government produced twenty-nine witnesses, and the jury returned a verdict of guilty against appellant on both the aforesaid counts contained in the indictment (T. R. 30). He was sentenced to three years' imprisonment on each count, the sentences to commence and run concurrently (T. R. 31). No appeal was taken.

Approximately six months after sentence the appellant filed a written motion for a new trial on the ground of newly discovered evidence (T. R. 32).

The District Court, Judge Goodman, filed a written order denying the motion for new trial (T. R. 49-51). A timely notice of appeal was filed (T. R. 52).

SUMMARY OF ARGUMENT.

1. Appellant's affidavit is insufficient as it is based upon hearsay and conclusions of law.

2. The extent of the allegedly newly discovered evidence is in the nature of impeachment.

3. The motion failed to meet the required standards.

4. There is no showing of the abuse of discretion by the trial judge.

ARGUMENT.

The trial judge acted correctly in denying appellant's motion for a new trial upon the grounds of alleged newly discovered evidence.

At page 3 of appellant's brief is found the following statement:

> "At the trial of the defendant the only witness testifying against him was one Harry Winkelblack . . ."

There were in fact twenty-nine witnesses used by the government and, in the absence of the record of their testimony, it must be presumed that said testimony was most favorable to the government.

> "In determining the right to reverse we are required to consider the evidence heard by the District Court not appearing in the record as supporting that court's decision. As stated in In re Chapman Coal Co., 196 F.2d 779, 785: 'Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by evidence which might have been adduced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking re-

versal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error. Turner Glass Corp. v. Hartford Empire Co., 7 Cir., 173 F.2d 49, 51; Royal Petroleum Corp. v. Smith, 2 Cir., 127 F.2d 841, 843; 12 Cyclopedia of Federal Procedure, 2d Ed. 1944, § 6208, p. 224 et seq.' '' *United States v. Vanegas, Jr.* (9th Cir.), No. 13,753, October 30, 1954.

At the time the witness Winkelblack testified, he was not a United States prisoner. He was on parole from the State of California (T. R. 56).

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1. INSUFFICIENCY OF APPELLANT'S AFFIDAVIT.

Appellant's motion was based upon an affidavit containing only hearsay statement and conclusions of law (T. R. 33-48). Nowhere in said affidavit does affiant explain how or when he discovered the alleged letters attached to the affidavit as Exhibits A and B. The affidavit contains only the conclusions of law that the affiant used due diligence and discovered the letters sometime after the conclusion of the trial. Nowhere in the affidavit do there appear any facts describing the affiant's conduct and/or actions constituting his alleged due diligence. Nowhere in the affidavit is it alleged how or where the affiant discovered the letters attached to the affidavit as exhibits nor is there any allegation from whom the said affiant acquired the newly discovered evidence.

Affidavits containing hearsay statements will not support a motion for a new trial upon the grounds of newly discovered evidence.

> ". . . We have carefully reviewed all of the affidavits and find them to consist largely of hearsay statements and of impeachment of testimony received in the trial . . ." *Wagner v. United States* (9th Cir.), 118 F.2d 801 at 802.
>
> "The affidavits were ex parte, the affiants were not brought into court where they might have been subject to cross-examination, and where the court might have an opportunity to observe their manner and demeanor." *Martin v. United States* (6th Cir.), 154 F.2d 269 at 270.

---

2. IF THE EXTENT OF THE NEWLY DISCOVERED EVIDENCE IS IN THE NATURE OF IMPEACHMENT, IT WILL NOT SUPPORT THE MOTION.

> "Motions for new trials being addressed to the sound discretion of the trial court, and it being manifest the trial court did not act arbitrarily or capriciously nor upon any erroneous concept of the law, the appellate court may not substitute its judgment for that of the trial judge. United States v. Johnson, 327 U.S. 106, 66 S.Ct. 474, 90 L.Ed. 562.
>
> ". . . The mere discovery of additional impeaching evidence does not meet the requisites for a new trial." *Gage v. United States* (9th Cir.), 167 F.2d 122.

The trial judge, in a written opinion denying appellant's motion for a new trial, stated that the newly

discovered evidence consisted of no more than facts "in the nature of impeachment" (T. R. 49-51).

> ". . . In the application of this rule, the District Court considered whether the so-called newly discovered evidence was cumulative, whether it was diligently obtained and presented, and whether some of it was merely impeaching. The court found that much of the evidence was subject to one or the other of these infirmities and that on the whole it did not meet the standards of newly discovered evidence warranting a new trial. In this we cannot say, as a matter of law, that the trial court erred." *United States v. Johnson* (7th Cir.), 142 F.2d 588.

---

3. THE TEST APPLIED IN CONSIDERING THE MOTION.

As to whether or not a motion for a new trial should be granted upon the grounds of newly discovered evidence, this Circuit requires that the following standards be met.

> ". . . There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. See also Isgrig v. United States, 4 Cir., 109 F.2d 131, 194." *Wagner v. United States* (9th Cir.), 118 F.2d 801 at 802.

It is submitted that appellant made no showing to the trial judge that any of the five above requisites be met.

---

4. THE DISCRETION OF THE TRIAL COURT.

The denial or granting of a new trial based upon a motion of newly discovered evidence rests within the discretion of the trial judge.

> ". . . It is the weight of authority in both State and federal courts that newly discovered evidence offered as a basis for a new trial must not be merely cumulative and impeaching. In any event it must be of such a character as would probably produce an acquittal at a new trial. See Johnson v. United States, supra, 32 F.2d at page 130. Obviously if it be merely cumulative and impeaching and of such a character as would not probably result in an acquittal at the new trial, the interest of justice would not be served in granting a new trial. See Rule 33, F.R. Crim. P. The evidence offered by the Frayne and Zimmy affidavits leads straight back to the dispute as to the veracity at the trial. The jury elected not to believe Rutkin and those testifying on his behalf. Veracity of witnesses may not be tested for a second time and by an appellate tribunal.
>
> "We are of the opinion that the new evidence offered was merely cumulative and impeaching and was not of such a character as would probably lead to acquittal at a new trial. The district Judge was of like opinion. Certainly we cannot say that he abused his discretion in refusing the motion for a new trial. Cf. Prisament v. United States, 5

Cir., 1938, 96 F.2d 865, 866 and Wagner v. United States, 9 Cir., 1941, 118 F.2d 801, 802. It is the law that the trial court must be allowed wide discretion in granting or refusing a new trial on the ground of newly discovered evidence. Casey v. United States, 9 Cir., 1927, 20 F.2d 752, certiorari denied 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632." *United States v. Rutkin* (3rd Cir.), 208 F.2d 647 at 654.

CONCLUSION.

It is submitted that the motion for a new trial was properly denied by the trial judge and that there has been no showing of abuse of his discretion in denying said motion. Appellant's affidavit was clearly inadequate and stated no facts as to how, where and when the alleged evidence was discovered. The affidavit alleged merely cumulative or impeaching evidence.

Dated, San Francisco, California,
November 17, 1954.

LLOYD H. BURKE,
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JOHN H. RIORDAN, JR.,
Assistant United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14350

United States
Court of Appeals
For the Ninth Circuit.

DORIS BERNICE SHACKELFORD, ALLAN RAY SHACKELFORD and LARRY WILLIAM SHACKELFORD, Minors, by Doris Bernice Shackelford, Their Guardian ad Litem,

Appellants,

vs.

MISSION TAXICAB COMPANY, INC., a Corporation; ROBERT GOODRICK and BUFORD H. SHIPMAN,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-29-54

No. 14350

United States
Court of Appeals
For the Ninth Circuit.

DORIS BERNICE SHACKELFORD, ALLAN RAY SHACKELFORD and LARRY WILLIAM SHACKELFORD, Minors, by Doris Bernice Shackelford, Their Guardian ad Litem,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California

No. 30732

DORIS BERNICE SHACKELFORD and ALLAN RAY SHACKELFORD and LARRY WILLIAM SHACKELFORD, Minors, by DORIS BERNICE SHACKELFORD, Their Guardian Ad Litem,

Plaintiffs,

vs.

MISSION TAXI COMPANY, a Corporation, ROBERT GOODRICK, and BUFORD H. SHIPMAN,

Defendants.

COMPLAINT

Plaintiffs complain of defendants and for cause of action allege:

I.

That plaintiff Allan Ray Shackelford is a minor of the age of two years and that by an order of the above-entitled court duly made and entered plaintiff Doris Bernice Shackelford has been appointed guardian ad litem of said minor to institute and prosecute this action.

II.

That plaintiff Larry William Shackelford is a minor of the age of one year and that by an order of the above-entitled court duly made and entered

plaintiff Doris Bernice Shackelford has been appointed guardian ad litem of said minor to institute and prosecute this action.

III.

That at all times herein mentioned plaintiff Doris Bernice Shackelford and William Thomas Shackelford, deceased, were wife and husband and that said plaintiff Doris Bernice Shackelford is the surviving widow of said William Thomas Shackelford, deceased, and that Allan Ray Shackelford and Larry William Shackelford are the sole surviving children of said plaintiff Doris Bernice Shackelford and William Thomas Shackelford, deceased.

IV.

That at all times hereinafter mentioned the defendant Mission Taxi Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of San Jose, County of Santa Clara, State of California; that at all times herein mentioned defendant Mission Taxi Company carried on the business of operating and maintaining a line of cabs and cab service for the transportation of passengers for hire in and around and near the said City of San Jose, County of Santa Clara, State of California, and that William Thomas Shackelford, deceased, received the injuries causing his death as hereinafter set out in a certain taxicab which the defendant Mission Taxi Company was then operating in

and as a part of its said system of cab service as a common carrier of passengers for hire.

V.

Plaintiffs are informed and believe and therefore allege that at all times herein mentioned defendant Robert Goodrick was the agent and employee of defendant Mission Taxi Company; that said defendant Goodrick was the operator of one of defendant Mission Taxi Company's taxicabs, and that at all times herein mentioned defendant Goodrick was acting within the scope of his employment.

VI.

That at all times herein mentioned defendant Buford H. Shipman was the owner of a certain 1930 Studebaker Sedan automobile bearing 1950 Washington State License Number A 155714; plaintiffs are informed and believe and therefore allege that at all times herein mentioned said Studebaker automobile was driven and operated by one Dallas Cutler with the permission and consent of defendant Buford H. Shipman.

VII.

Plaintiffs Doris Bernice Shackelford, Allan Ray Shackelford and Larry William Shackelford are citizens of the State of Minnesota; that defendant Mission Taxi Company is a corporation incorporated under the laws of the State of California; that defendant Robert Goodrick is a citizen of the State of Ohio; that defendant Buford H. Shipman is a citizen of the State of Washington. The matter in controversy exceeds, exclusive of interest and

costs, the sum of Three Thousand ($3,000.00) Dollars.

VIII.

That at all times herein mentioned U. S. Highway 101 was a public highway running in a general northerly and southerly direction through the County of Santa Clara, State of California.

IX.

Plaintiffs are informed and believe and therefore allege that at all times herein mentioned that certain Studebaker Sedan automobile owned by defendant Buford H. Shipman was being operated and driven by one Dallas Cutler with the permission and consent of defendant Buford H. Shipman in a generally southerly direction along and upon U. S. Highway 101 in the County of Santa Clara, State of California, at a point about two miles south of U. S. Naval Air Station, Moffett Field.

X.

Plaintiffs are informed and believe and therefore allege that on the morning of July 30, 1950, in or around San Jose, California, William Thomas Shackelford, deceased, entered a certain taxicab owned and operated by defendant Mission Taxi Company and driven and operated by defendant Robert Goodrick; that at said time and place William Thomas Shackelford, deceased, was received by defendants Robert Goodrick and Mission Taxi Company as a passenger of said taxicab for the journey which William Thomas Shackelford, deceased, intended to make.

XI.

Plaintiffs are informed and believe and therefore allege that on the morning of July 30, 1950, defendants Robert Goodrick and Mission Taxi Company transported William Thomas Shackelford, deceased, as a passenger of the taxicab of defendant Mission Taxi Company in a generally northerly direction along and upon U. S. Highway 101 at a point in the County of Santa Clara about two miles south of the United States Naval Air Station at Moffett Field; that while so carrying William Thomas Shackelford, deceased, in the said cab as a passenger, the defendants Robert Goodrick and Mission Taxi Company did so negligently, carelessly and recklessly operate and manage the said taxicab that said taxicab ran into and collided with that certain Studebaker Sedan automobile owned by defendant Buford H. Shipman which was being then operated and driven by one Dallas Cutler in a generally southerly direction along and upon U. S. Highway 101.

XII.

Plaintiffs are informed and believe and therefore allege that as a direct and proximate result of the carelessness and negligence of defendants Mission Taxi Company and Robert Goodrick, as hereinabove set forth, William Thomas Shackelford, deceased, sustained the following injuries, among others:

Skull fracture, multiple lacerations of the liver, comminuted fractures of his legs, which said injuries resulted in his death on August 3, 1950.

XIII.

Plaintiffs are informed and believe and therefore allege that at the time of said injuries which resulted in the death of William Thomas Shackelford, as aforesaid, the deceased was in good health and had a yearly income of approximately Five Thousand ($5,000.00) Dollars; that William Thomas Shackelford, deceased, made financial contributions to and provided the sole support of plaintiffs; that plaintiffs were dependent upon said deceased for financial support, care and maintenance, and that as a result of the negligence and carelessness of defendants Mission Taxi Company and Robert Goodrick, as herein alleged, which caused the death of William Thomas Shackelford, deceased, the plaintiffs have been deprived of the financial support, care and maintenance of said William Thomas Shackelford, deceased, all to their general damage in the sum of One Hundred Twenty Thousand Dollars ($120,000.00).

As and for a Second Separate and Distinct Cause of Action, Plaintiffs Allege:

I.

Plaintiffs repeat and reallege as a part of this cause of action each and all of the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first cause of action with like effect as if herein fully alleged and incorporates herein all the facts therein set forth.

II.

Plaintiffs are informed and believe and therefore

allege that on the morning of July 30, 1950, William Thomas Shackelford, deceased, was being transported as a passenger for hire in a taxicab owned by defendant Mission Taxi Company and operated by defendants Mission Taxi Company and Robert Goodrick in a generally northerly direction upon United States Highway 101 at a point on said highway about two miles south of the United States Naval Air Station, Moffett Field.

III.

Plaintiffs are informed and believe and therefore allege that at said time and place, Dallas Cutler was operating that certain Studebaker automobile owned by defendant Buford H. Shipman in a generally southerly direction along and upon said U. S. Highway 101; that at said time and place Dallas Cutler did so carelessly, negligently and recklessly operate, manage and control the said Studebaker Sedan automobile that the said Studebaker Sedan automobile was caused to run into and collide with that certain taxicab in which William Thomas Shackelford, deceased, was riding as a passenger for hire.

IV.

Plaintiffs are informed and believe and therefore allege as a direct and proximate result of the carelessness and negligence of said Dallas Cutler, as hereinabove set forth, William Thomas Shackelford, deceased, sustained the following injuries, among others: Skull fracture, multiple lacerations of the liver, comminuted fractures of his legs, which injuries resulted in his death on August 3, 1950.

V.

Plaintiffs are informed and believe and therefore allege that at the time of said injuries which resulted in the death of William Thomas Shackelford, as aforesaid, the deceased was in good health and had a yearly income of approximately Five Thousand ($5,000.00) Dollars; that William Thomas Shackelford, deceased, made financial contributions to and provided the sole support of plaintiffs; that plaintiffs were dependent upon said deceased for financial support, care and maintenance, and that as a result of the negligence and carelessness of Dallas Cutler, as herein alleged, which caused the death of William Thomas Shackelford, deceased, the Plaintiffs have been deprived of the financial support, care and maintenance of said William Thomas Shackelford, deceased, all to their general damage in the sum of One Hundred Twenty Thousand ($120,000.00) Dollars.

Wherefore, plaintiffs pray judgment against defendants in the sum of One Hundred Twenty Thousand Dollars ($120,000.00), for their costs of suit, and for such other and further relief as the court may deem proper in the premises.

/s/ HAROLD H. FULKERSON,

ROCKWELL & FULKERSON,

Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed July 24, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS MISSION TAXICAB COMPANY, INC., a Corporation, and ROBERT GOODRICK

Come now the defendants Mission Taxicab Company, Inc., a corporation (sued herein as Mission Taxi Company, a corporation), and Robert Goodrick, and appearing for themselves alone and not for any other person, firm, or corporation, for their Answer to the Complaint on file:

As to the First Cause of Action

I.

These answering defendants admit the allegations of Paragraphs I-X, inclusive, of said First Cause of Action.

II.

Answering the allegations of Paragraph XI from the commencement thereof to and including the word "Field" in line 19, page 4, of said complaint, said allegations are admitted; as to the remaining allegations of Paragraph XI these answering defendants deny generally and specifically, each and every, all and singular, said allegations.

III.

Answering the allegations of Paragraph XII, these answering defendants deny that as a direct or proximate or any result of any carelessness or negligence or recklessness of these answering defendants, or of either of them, said William Thomas

Shackelford sustained the injuries alleged or any injuries resulting in his death, whether as alleged in Paragraph XII, or otherwise.

IV.

Answering the allegations of Paragraph XIII, these answering defendants, while at all times denying carelessness or negligence or recklessness, allege that they are without sufficient knowledge, information or belief to enable them to answer any of the allegations of said paragraph, and basing their denial upon that ground, deny generally and specifically, each and every, all and singular, said allegations, and specially deny that plaintiffs, or any of them, have been or will be damaged in the sum of $120,000.00, or in any sum or amount whatsoever, whether as alleged in Paragraph XIII, or otherwise.

V.

These answering defendants deny that by reason of any act or acts, fault, carelessness, recklessness or negligence upon their part or upon the part of either of them said William Thomas Shackelford sustained injuries of any kind or character, whether fatal or otherwise, or that plaintiffs, or either of them, sustained damages in any sum or amount whatsoever.

As to the Second Cause of Action

I.

These answering defendants are not required to answer the Second Cause of Action.

Wherefore, these answering defendants pray that plaintiffs take nothing by their complaint on file, and that said defendants have judgment for their costs of suit herein incurred and for such other and further relief as to the Court may seem proper.

Dated: August 13th, 1951.

BRONSON, BRONSON & McKINNON,

By /s/ GEORGE K. HARTWICK,

Attorneys for Defendants Mission Taxicab Company, Inc., a Corporation, and Robert Goodrick.

[Endorsed]: Filed August 14, 1951.

[Title of District Court and Cause.]

DEPOSITION OF EARL BRANTLEY

a witness for the plaintiff, taken by agreement of Counsel before John A. Michaelis, Notary Public in and for the Canal Zone, on the 11th day of July, 1953, at 2:30 p.m. at Balboa, Canal Zone. Present: Arosemena & Benedetti (Rodrigo Arosemena), for plaintiff, and Van Siclen, Ramirez & De Castro (Charles L. Ramirez), for defendants. It was stipulated that all objections to the questions propounded are not to be decided until, when and if the testimony taken on this deposition is presented.

The witness, Earl Brantley, was duly sworn by

(Deposition of Earl Brantley.)

John A. Michaelis, Notary Public, and testified as follows:

1. What is your name?
   Earl Brantley.

2. Where do you live?
   At Coco Solito, Canal Zone.

3. What is your occupation?
   Aviation radioman in the U. S. Navy.

4. Where are you presently stationed?
   At Coco Solo, Canal Zone.

5. Were you in the Navy on July 29 and July 30, 1950?
   Yes.

6. Where were you attached at that time?
   Naval air station at Moffett Field, California.

7. In July, 1950, were you acquainted with a person by the name of William Thomas Shackelford?
   Yes.

8. Where did you know Mr. Shackelford?
   I was stationed with him for about a year in the Navy.

9. What was his occupation?
   He was a navigation radioman.

10. What was his rating?
    Aviation radioman, first class.

11. Where was he stationed on July 29 and 30, 1950?

(Deposition of Earl Brantley.)

At the Naval Air Station, Moffett Field, California.

12. Now, directing your attention to the events that occurred in the evening of July 29 and the morning of July 30, 1950, did you leave the Naval Air Station at Moffett Field in the afternoon or evening of July 29, 1950?

Evening.

13. At what time did you leave?

Early evening.

14. Did anyone accompany you?

Yes.

15. Who accompanied you?

There were seven radiomen, including Shackelford.

16. Did William Shackelford accompany you?

Yes.

17. Where did you go?

To San Jose, California.

18. About what time did you arrive at San Jose?

About 4 o'clock.

19. What did you do while in San Jose?

We looked the town over.

20. How long did you remain in San Jose?

Including the time that took to have a ride around town, it was about 2 o'clock in the morning.

(Deposition of Earl Brantley.)

21. What did you do then?

We went around to hitch-hike to Moffett Field.

22. Who was with you when you commenced your attempt to hitch-hike back to your station at Moffett Field?

Shackelford.

23. What time did you commence trying to hitch-hike back to Moffett Field?

About midnight.

24. How long did you continue trying to hitch-hike back to Moffett Field?

About two hours.

25. What did you do then?

Stopped a taxi.

26. Do you recall what kind of a taxicab you hailed?

A yellow taxicab.

27. Do you recall where it was that you hailed the cab?

Someplace around the main part of the City, don't know exactly.

28. Will you give us your best recollection of where it was that you hailed the cab?

About six or eight blocks from the main road.

29. What seat in the taxicab did you and William Shackelford occupy?

(Deposition of Earl Brantley.)

I, left, and he occupied the right, in the back part of the car.

30. What happened after you and William Shackelford got into the cab?

The cab driver drove faster speed.

31. Are you able to drive an automobile?

Yes.

32. Do you have a driver's license?

Yes.

33. From what State is your license issued?

Have a license from the State of Virginia.

34. How long have you been driving automobiles?

About thirteen years.

35. Will you describe the manner in which the taxicab was driven after you and William Shackelford engaged it to take you to Moffett Field?

He was driving about 65 miles, the lowest.

36. Do you recall how effective were the lights on the taxicab?

No, I don't.

37. What is your recollection of the distance illuminated by the lights on the taxicab?

I wouldn't know.

38. Did the taxicab stop at any time other than for traffic lights after you and Mr. Shackelford had engaged it?

(Deposition of Earl Brantley.)

Yes.

39. For what did it stop?

He stopped at a fight that was out in front of a bar in the driveway.

40. How did it happen that the cab stopped at the scene of the fight?

He saw the fight and put in, we told him not but he did.

41. After leaving the scene of the fight, did anything occur to prevent the taxicab from taking you to your station at Moffett Field?

Yes.

42. What happened?

We had a collision with another automobile.

43. What is your recollection of the amount of traffic on the highway travelled by the taxicab on the way from San Jose to the point of the accident?

The traffic was rather heavy.

44. Was the traffic heavy or light?

Heavy traffic.

45. Were other cars frequent, occasional or infrequent?

Frequent.

46. Can you give us any other information to indicate the extent of the traffic on the road prior to the accident?

It is a well-travelled highway and there is a lot of traffic on it.

(Deposition of Earl Brantley.)

47. Now, directing your attention to the manner in which the taxicab was being driven immediately prior to the accident, do you know at what speed the taxi was being driven?

He was driving fast; never falled under 65.

48. How do you know?

I was looking at the speedometer.

49. During the course of the trip from the time you initially engaged the taxicab until the time of the accident, was anything said by anyone in the cab concerning the speed of the cab?

Yes.

50. What was said?

We told him that we were in no hurry, about two or three times.

51. Who said it?

I said it once and Shackelford a couple of times.

52. When was it said?

First time before we stopped at the fight.

53. Was anything else said by anybody in the cab concerning the speed of the cab?

We warned the cab driver.

54. Did the taxicab driver reduce his speed when you asked him to?

No.

55. Now, can you describe the conduct of the

(Deposition of Earl Brantley.)

driver as he drove the taxicab immediately prior to the accident?

There were several times he was looking back talking to us, but as far as immediately I couldn't say.

56. Was any conversation had between the cab driver, you and William Shackelford?

Yes.

57. Who started the conversation?

The cab driver.

58. Who carried on the conversation?

The cab driver.

59. What part did you take in the conversation?

We took very little part in the conversation.

60. What part did William Shackelford take in the conversations?

The only part that Shackelford took in the conversation was to tell him "no" to the deals he was making to us.

61. What was the subject of the conversation?

That the cab driver said that he could take us to a dancing hall where we could dance and see girls.

62. How did the driver in the front seat carry on the conversation with you and William Shackelford in the back seat?

He was looking back talking to us.

63. Did he turn around?

(Deposition of Earl Brantley.)

Yes.

64. Did he take his eyes off the road?

Yes.

65. Did this conversation continue until the accident?

Not actually until the accident, but close.

66. At any time prior to the accident, did you see the southbound car which collided with the taxicab?

No.

67. Do you know whether the driver of the taxicab applied his brakes at any time prior to the accident, and if so, how long prior to the accident?

I don't know.

68. Where were you sitting in the taxicab?

Sitting in the back seat, left side.

69. Where was William Shackelford sitting in the taxicab?

In the back seat on the right side.

70. Do you know whether William Shackelford saw the southbound car prior to the accident?

I cannot say for sure, but I believe he did.

71. How do you know?

Because just before he collapsed, I heard him yell.

72. Did William Shackelford do anything or say anything immediately prior to the accident that in-

(Deposition of Earl Brantley.)

dicated to you that he realized the accident was imminent?

The only thing is that he yelled.

73. What did he do or say?

We couldn't understand what he said.

74. Were you hurt in the accident?

Yes.

75. How were you taken from the scene of the accident?

On a Navy ambulance.

76. Where were you taken?

I was taken to the Moffett Field dispensary.

77. Was William Shackelford hurt in the accident?

Yes.

78. Do you know where he was taken?

He was taken to Moffett Field dispensary, and right away, taken to the hospital.

Cross-Examination

By Mr. Ramirez:

79. At what time of the morning did you pick up the taxicab?

Around two o'clock.

80. Had you and Shackelford had any drinks at all from 6 o'clock that evening until the time of the accident?

Yes.

(Deposition of Earl Brantley.)

81. What were you drinking?

Beer.

82. Did you, at any time, drink whisky that day?

Early in the afternoon maybe we might have had a couple of drinks.

83. Did you have anything to drink at all in the taxicab?

No.

84. Did you give the driver of the taxicab any drinks at all while you were in the taxicab?

No.

85. Did you stop in that way to have drinks from the time that you took the taxicab until the time of the accident?

No.

86. How was the inside of the taxicab lighted up, if it was lighted up? In other words, were there any lights in the inside of the taxicab while you were a passenger?

The interior lights were on.

87. With reference to the taxicab driver, where was Shackelford sitting?

In the right back seat.

88. That will be behind the taxicab driver or to the other side?

To the extreme right side.

89. As the car was going, were you on the outside lane or in the inside lane?

(Deposition of Earl Brantley.)

I was on the inside.

90. Will you now state where Shackelford was sitting?

On the back seat in the extreme right of the corner.

91. Where were you sitting on this drive before the accident?

I was also sitting on the back seat, to the left of Shackelford.

92. How far from Shackelford were you sitting?

I was sitting just close enough to Shackelford.

93. Did you sit on that side purposely in order to see?

Yes, and I sometimes moved over to the extreme left side.

94. What caused you to move from one position to another?

I wanted to check the speed of the cab.

95. Are you sure of the taxicab speedometer?

Yes.

96. Are you sure that it was working on this drive, and immediately prior to the accident?

Yes.

97. Were you watching anything else besides the driver and the speedometer?

I was watching a lot of things.

(Deposition of Earl Brantley.)

98. Were you watching the road?

A good part of the time, yes.

99. Did you notice headlights of other cars coming in your direction during the ride?

Yes.

100. Immediately before the accident where were you sitting, if you remember?

Down on the left side of the seat.

101. Were you trying to sleep?

No, I wasn't sleeping.

102. Did you see immediately before the accident, any headlights coming toward the car?

I didn't see anything immediately before the accident.

103. Can you give us a reason why you didn't see anything immediately before the accident?

I was looking forward at that time.

104. Did you notice a sudden lighting up in the interior of the cab just immediately before the accident?

No, I didn't.

105. Immediately before the accident, did you notice or did you feel a change in the course of the taxicab in which you were riding? That is, did you feel the taxicab swerve in any direction immediately before the accident?

Yes.

(Deposition of Earl Brantley.)

106. To what side?

I couldn't say.

107. If you were sitting at times, you stated, on the extreme left of the taxi, did you notice with reference to the road, whether the taxicab driver was driving toward the shoulder or in the right side, or toward the central lane of the road?

He was driving toward its shoulder.

108. Immediately before the accident, about a quarter of a mile before the accident, did you notice whether or not he was keeping at the right of the road?

We were passing a lot of cars.

109. To pass a car in front of him and then return to the outside lane?

Yes.

110. Were you conscious after the impact?

Yes.

111. Will you describe that highway?

Wide, about four lanes.

112. What was it made of, concrete or asphalt?

I believe it was asphalt, but wouldn't be sure.

113. You wouldn't say, however, that there were no headlights flashes on the car immediately before the accident?

No, I couldn't say that.

114. Were you able to observe the two cars after the accident?

(Deposition of Earl Brantley.)

I was too shocked after that.

115. Did you see the car with which your taxicab collided after the accident?

I didn't even see the car, I can remember.

116. And your taxicab?

The best I can remember of the taxicab is that it was turned completely down headed toward San Jose and the car was completely damaged.

117. Did you meet the passengers of the other car at all?

I have never met them.

118. The taxicab driver was very talkative; did you or Shackelford engage in conversation with him?

The only conversation we made was to turn down the propositions he was making us.

119. Why were you out of Moffett Field at the time?

We were on liberty.

120. When was your liberty up?

Until 8 o'clock the next day in the morning.

121. How far is San Jose from Moffett Field where you have to check in?

I don't know the distance; not a long distance, though.

122. Did you know Shackelford pretty well?

Only since June, 1950, when I met him.

(Deposition of Earl Brantley.)

123. During your trip from San Jose until the time of the impact, did you notice anything unusual about anything you have said of the speed of the cab?

The only unusual thing was passing cars and cutting up fast and speed.

124. But, despite that fact, were there any other accidents other than this one?

No.

125. Don't you remember anything after the impact?

Yes. Part of it.

126. What?

Getting out of the car.

127. Do you remember about the respective positions of your cab and the other car or any cars that might have been around?

There was another accident after this one. That is all I remember.

It was stipulated by Counsel that reading and signing of the deposition is waived because the witness will not be present within this jurisdiction after this date.

Certificate

United States of America,
Canal Zone—ss.

I, John A. Michaelis, a duly commissioned Notary Public in and for the Canal Zone, hereby certify as follows, to wit: That Earl Brantley, a witness for the plaintiff in the within-entitled action, appeared before me on the 11th day of June, 1953, at 2:30 p.m. o'clock, in my office at Balboa, in the Canal Zone, for the purpose of testifying in the above case; that before the taking of his deposition the said Earl Brantley was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the testimony he was about to give in said matter; that questions No. 1 through No. 78, inclusive, hereinabove, were put to the witness on direct examination by Rodrigo Arosemena, present as counsel for the plaintiffs, and questions No. 79 through No. 127, inclusive, hereinabove, were put to the witness on cross-examination by Charles E. Ramirez, present as counsel for the defendants; that the witness, Earl Brantley, answered all said questions; that all of said answers were taken down in shorthand and later typewritten as contained hereinabove; that counsel present for both parties agreed to waive the reading and signing of the within deposition by the witness, Earl Brantley, due to the latter's imminent departure from the Isthmus; that I have read the questions propounded and the answers thereto, as contained herein, and recall them to be as put to the witness and as an-

swered by him; and that I am not a party to or interested in above-entitled action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my commission, at Balboa, in the Canal Zone, on this 16th day of June, 1953.

[Seal] /s/ JOHN A. MICHAELIS.

My commission expires June 3rd, 1955.

United States of America,
Canal Zone—ss.

I, E. C. Lombard, Executive Secretary of the Canal Zone, in charge of the Seal of the Canal Zone Government,

Do Hereby Certify That John A. Michaelis, by and before whom the acknowledgment or proof of the annexed instrument was taken, was, at the time of taking the same, a duly commissioned and sworn Notary Public in and for the Canal Zone, and was duly authorized by the laws of the Canal Zone to take the acknowledgment or proof; further, that I have charge of the official records of the appointment of said Notary Public, that I have a record of his signature, and that I am acquainted with his handwriting and verily believe that the signature to the certificate of acknowledgment or proof of the annexed instrument is his true and genuine signature; further, that the impression of the seal of the said Notary Public as affixed on said cer-

tificate has been compared with the original on file in this office and is verily believed to be true and genuine; and further, that the acknowledgment or proof was taken in accordance with the laws of the Canal Zone.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Canal Zone Government, at Balboa Heights, Canal Zone, this 17th day of June, 1953.

/s/ E. C. LOMBARD.

[Endorsed]: Filed June 22, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause heretofore and on the 2nd day of November, 1953, came on regularly for trial in the above-entitled Court before the Honorable Michael J. Roche, Chief United States District Judge, presiding without a jury, a jury trial having been expressly waived by the parties hereto. Plaintiff Doris Bernice Shackelford appeared in person and by Messrs. Rockwell & Fulkerson and Harold H. Fulkerson, Esq., her attorneys; defendants Mission Taxicab Company, Inc., a corporation, and Robert Goodrick, appeared by Robert Goodrick in person and Messrs. Bronson, Bronson & McKinnon, E. H. Chapman, Esq., of counsel, their attorneys.

Witnesses were called, sworn and examined and evidence, both oral and documentary, was introduced on behalf of plaintiffs and on behalf of defendants and the cause having been closed and the Court having duly considered all the evidence and the same having been submitted to said Court for its decision, the Court, being fully advised in the premises, makes the following

Findings of Fact

I.

The allegations contained in Paragraph I of the Complaint are true.

II.

The allegations contained in Paragraph II of the Complaint are true.

III.

The allegations contained in Paragraph III of the Complaint are true.

IV.

The allegations contained in Paragraph IV of the Complaint are true.

V.

The allegations contained in Paragraph V of the Complaint are true.

VI.

The allegations contained in Paragraph VII of the Complaint are true.

VII.

The allegations contained in Paragraph VIII of the Complaint are true.

VIII.

It is true, as alleged in Paragraph IX of the Complaint, that said Studebaker Sedan automobile was being operated by one Dallas Cutler in a generally southerly direction along and upon U. S. Highway 101 in the County of Santa Clara, State of California, at a point about two miles south of U. S. Naval Air Station, Moffett Field, immediately prior to said accident.

IX.

That the allegations contained in Paragraph X of said Complaint are true.

X.

That at said point U. S. Highway 101 was a four-lane highway containing two northbound lanes east of the center double line; that said northbound lanes were each eleven feet in width and the hard parking shoulder on each side of the highway is twenty feet in width; that said highway at said point was level and straight; that at said time and place the posted speed limit was fifty-five miles per hour; that on the night in question the weather was clear, the moonlight was bright, that on July 29, 1950, the moon rose at 9:11 p.m. and set on the morning of July 30, 1950, at 7:41 a.m., and that the moon had been full at 9:17 p.m. on July 28, 1950; that defendant Robert Goodrick first observed said Studebaker automobile, operated by said Dallas Cutler, when said Studebaker automobile was between eight-five and one hundred feet distant from said taxicab op-

erated by said defendant Robert Goodrick at which time said Studebaker automobile was completely in the most easterly lane of said highway headed due south; that at said time and place the lights of said taxicab were adjusted to the low beam.

XI.

That it is not true, as alleged in Paragraph XI, that on the morning of July 30, 1950, defendants Robert Goodrick and Mission Taxicab Company, Inc., did so, or at all, negligently or carelessly or recklessly operate or managed said taxicab that said taxicab ran into or collided with said Studebaker Sedan operated by said Dallas Cutler at the time and place alleged.

XII.

That it is not true, as alleged in Paragraph XII, that as a direct or proximate or any result of any carelessness or negligence of defendants Mission Taxicab Company, Inc., or Robert Goodrick that said William Thomas Shackelford, deceased, sustained any injuries resulting in his death at the time alleged, or otherwise.

XIII.

That it is not true, as alleged in Paragraph XIII, of the complaint, that as a result of any carelessness or negligence of defendants Mission Taxicab Company, Inc., or Robert Goodrick that plaintiffs have been deprived of financial support or care or maintenance of or by said William Thomas Shackelford, deceased, or have been damaged in the sum of $120,000.00, or in any sum or amount whatsoever.

XIV.

The Court further finds that on July 30, 1950, at or about the hour of 2:30 a.m., a taxicab operated by defendant Robert Goodrick on behalf of defendant Mission Taxicab Company, Inc., in which William Thomas Shackelford, deceased, was riding as a passenger for hire was being operated by said Robert Goodrick in a generally northerly direction on the easterly side of Bayshore Highway, otherwise known as U. S. Highway 101, in the County of Santa Clara, State of California, at a point about two miles South of U. S. Naval Air Station, Moffett Field, with all due care and caution; that at the same time a Studebaker Sedan automobile was being operated in a southerly direction on said U. S. Highway 101 on the easterly portion thereof in a reckless, careless and negligent manner by one Dallas Cutler; that said Studebaker Sedan automobile so operated by said Dallas Cutler entered said easterly portion of said U. S. Highway 101 within such close proximity to the approaching taxicab operated by said defendant Robert Goodrick that said defendant Robert Goodrick was unable to avoid colliding with said Studebaker Sedan automobile operated by said Dallas Cutler; that the injuries sustained by said William Thomas Shackelford, deceased, and the damages sustained by plaintiffs were wholly and solely, directly and proximately, caused by the recklessness, carelessness and negligence of said Dallas Cutler, as aforesaid.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That said plaintiffs are entitled to take nothing in said cause of action from defendants Mission Taxicab Company, Inc., a corporation, and Robert Goodrick, and that said defendants Mission Taxicab Company, Inc., a corporation, and Robert Goodrick, are entitled to judgment in their favor but without costs.

Let Judgment Be Entered Accordingly.

Dated: This 2nd day of March, 1954.

/s/ MICHAEL J. ROCHE,
Chief United States District Judge.

Lodged February 25, 1954.

[Endorsed]: Filed March 2, 1954.

In the Southern Division of the United States District Court, for the Northern District of California

No. 30732

DORIS BERNICE SHACKELFORD and ALLEN RAY SHACKELFORD, and LARRY WILLIAM SHACKELFORD, Minors, by DORIS BERNICE SHACKELFORD, Their Guardian Ad Litem,

Plaintiffs,

vs.

MISSION TAXI COMPANY, a Corporation, ROBERT GOODRICK and BUFORD H. SHIPMAN,

Defendants.

JUDGMENT

The above-entitled cause having heretofore and on the 2nd day of November, 1953, come on regularly for trial in the above-entitled Court before the Honorable Michael J. Roche, Chief United States District Judge, presiding without a jury, a jury trial having been expressly waived by the parties hereto, and plaintiff Doris Bernice Shackelford having appeared in person and by Messrs. Rockwell & Fulkerson and Harold H. Fulkerson, Esq., her attorneys; and defendants Mission Taxicab Company, Inc., a corporation, and Robert Goodrick, appeared by Robert Goodrick in person and Messrs. Bronson, Bronson & McKinnon, E. H. Chapman,

Esq., of counsel, their attorneys, and witnesses having been called, sworn and examined, and evidence, both oral and documentary, having been introduced on behalf of plaintiff and on behalf of defendants and the cause having been closed and the Court having duly considered all of the evidence and the same having been submitted to said Court for its decision, and written Findings of Fact and Conclusions of Law having been heretofore made and filed, which constitute the decision of the Court herein, the Court now orders Judgment in accordance therewith;

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing from defendants Mission Taxicab Company, Inc., a corporation, and Robert Goodrick, and that judgment be rendered in favor of said defendants but without costs.

Dated: This 2nd day of March, 1954.

/s/ MICHAEL J. ROCHE,
Chief United States District Judge.

Lodged February 25, 1954.

[Endorsed]: Filed March 2, 1954.

Entered March 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that Doris Bernice Shackelford and Allen Ray Shackelford, and Larry William Shackelford, minors, by Doris Bernice Shackelford, their guardian ad litem, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 3, 1954.

/s/ HAROLD H. FULKERSON,
Attorney for Appellants Doris Bernice Shackelford, Allen Ray Shackelford and Larry William Shackelford.

[Endorsed]: Filed April 1, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Pursuant to the requirement of Rule 75(d) of the Federal Rules of Civil Procedure, Appellants submit the following Statement of Points on which they intend to rely on this appeal:

I.

The District Court erred in making the Findings of Fact and Conclusions of Law in that such findings and conclusions are not supported by the evidence.

II.

The District Court erred in rendering Judgment for the Defendants and not for the Plaintiffs.

/s/ HAROLD H. FULKERSON,
Attorneys for Appellants.

[Endorsed]: Filed April 14, 1954.

The United States District Court, Northern District of California, Southern Division

Case No. 30732

Before: Hon. Michael J. Roche,
Judge.

DORIS BERNICE SHACKELFORD, et al.,

Plaintiffs,

vs.

MISSION TAXI COMPANY, et al.,

Defendants.

REPORTER'S TRANSCRIPT

Appearances:

For Plaintiffs:

MESSRS. ROCKWELL & FULKERSON, by
HAROLD FULKERSON, ESQ.

For Defendants:

MESSRS. BRONSON, BRONSON & McKINNON, by
EDWIN H. CHAPMAN, ESQ.

Monday, November 2, 1953

Mr. Fulkerson: I will call Mr. DeVries.

FRANCIS K. DeVRIES

called as a witness on behalf of the Plaintiffs and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: What is your full name, please?

A. Francis K. DeVries.

Q. Where do you live? A. San Jose.

Q. Your business or occupation?

A. I am a California State Patrolman.

Q. How long have you been so engaged?

A. Eleven years.

The Court: Take the witness.

Direct Examination

By Mr. Fulkerson:

Q. Where are you presently stationed, Mr. DeVries? A. San Jose.

Q. Where were you stationed on July 29 and 30, 1950? A. San Jose.

Q. Is there a highway known as the Bayshore Highway in Santa [2*] A. Yes, sir.

Q. Where is that located?

A. Well, it runs from, generally speaking, San Jose to San Francisco and it runs near Moffett Field. I heard that mentioned, if that's what you mean.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Francis K. DeVries.)

Q. Moffett Field?

A. It is on the route. It is adjacent to the Bayshore Highway.

Q. The Bayshore Highway would lead from San Jose to Moffett Field? A. That's right.

Q. Did you have, in the morning of July 30, 1950, an occasion to investigate an accident that occurred on the Bayshore Highway between San Jose and Moffett Field? A. Yes, I did.

Q. Do you know what time that accident occurred? A. About 2:30 a.m.

Q. Two-thirty in the morning, July 30th?

A. Yes.

Q. What time did you commence to investigate it?

A. The time we were notified of the accident was 2:38 and that's official, 2:38, and then we have more or less guess back about how long it took someone to get to a phone and to call us and so forth: so, roughly, the accident occurred, as near as we can tell, about 2:30. We received the call at 2:38 [3] and we arrived at 2:51.

Q. Now, can you tell us, with reference to Moffett Field, or with reference to any other landmark, where, on the Bayshore Highway between San Jose and Moffett Field, this accident occurred?

A. Well, it happened about a half mile south of Fair Oaks Avenue which is now a part of Sunnyvale, I believe, and that would be roughly a mile and a half—possibly two miles south of the main entrance to Moffett Field.

(Testimony of Francis K. DeVries.)

Q. Can you——

The Court: Would that be on the main highway?

The Witness: That's the main highway.

Q. (By Mr. Fulkerson): Would you describe the appearance and the construction of the highway at that location?

A. Well, it is a real wide, four-lane highway, with about 11-foot lanes, I believe, four of them; wide shoulders of about 20 feet on each side. It is undivided. It is divided only by a dividing line.

Q. And is it straight or curved?

A. Straight.

Q. It is flat or hilly?

A. It is flat; straight and flat.

Q. I have a sketch here for illustrative purposes, Mr. DeVries. Would you take a look at this and tell me if it accurately pictures the Bayshore Highway at the point that you [4] have referred to?

A. Yes, I would say it is a replica of it.

Mr. Fulkerson: If I may, then, I would like to offer this as Plaintiffs' 1.

Mr. Chapman: No objection.

The Court: It may be admitted and marked.

The Clerk: Plaintiffs' Exhibit 1 admitted and filed in evidence.

(Whereupon the sketch referred to above was admitted and filed into evidence as Plaintiffs' Exhibit No. 1.)

Q. (By Mr. Fulkerson): Now, at the time you

(Testimony of Francis K. DeVries.)

arrived at the scene of the accident, Mr. DeVries, what was the condition of visibility?

A. Well, it was night time and it was clear.

Q. Do you know whether or not there was a moon? A. I don't remember.

Q. Was there any rain or fog or anything like that? A. No.

Q. Would you describe what you observed when you arrived at the scene of the accident?

A. Well, there was two vehicles involved. One of them was driven by Cutler, Dallas Cutler and the other one was driven by Goodrick, the taxi.

The car driven by Dallas Cutler, which I have called [5] No. 1 here, Vehicle No. 1, was resting on its side in the north-bound lane or south-bound lane—correction, in the north-bound lanes.

The Court: I suggest that you mark the diagram north and south.

Mr. Fulkerson: This is north (indicating).

Q. (By Mr. Fulkerson): Can you indicate on this blackboard where, with relation to these lanes, you observed the Cutler car?

The Court: Pardon me. There is a pointer down there. Give him the pointer.

The Witness: Well, this happened in 1950 and I don't remember too much about this accident other than what I have written down here and I have written here that Vehicle No. 1 was resting on its side in the north-bound lane, so I believe it was resting, taking up two of the lanes—this is the

(Testimony of Francis K. DeVries.)

north-bound lanes, these two. It would be right in here, in relationship to the road. (Indicating.)

Q. (By Mr. Fulkerson): Would you put one of these little markers here?

Mr. Chapman: I wonder if those lanes could be marked 1 and 2?

Mr. Fulkerson: For the Court's information, may it be pointed out, Mr. Chapman, that up here at the top, we have the Bayshore Highway, U.S. 101, one-half mile south of [6] Fair Oaks Avenue. The scale is one and one-sixteenth inches to one foot, and then in the far left column is the shoulder, 20 feet and S-1 indicates South-1, 11 feet. S-2 indicates South-2, 11 feet. Across the double line, North-2, 11 feet, and North-1, 11 feet, and the shoulder, 20 feet, and you have placed the green car indicator across the North-1 and North-2 line in the two north-bound lanes?

The Witness: That's right.

Q. (By Mr. Fulkerson): Now, can you indicate where, with reference to what you have termed the Cutler car, was the taxicab?

If the record would show that Mr. DeVries has used a green marker to indicate the location of the so-called Cutler car.

Q. (By Mr. Fulkerson): Do your records show an accurate distance, Mr. DeVries?

A. No, this represents approximately 160 feet northward of the other vehicle.

Q. In which direction was the taxicab, which

(Testimony of Francis K. DeVries.)

you have indicated as the red marker? Which direction was it facing?

A. It was facing north-bound.

Q. On the south-bound shoulder?

A. That's correct.

Q. And at a distance of——?

A. Approximately 160 feet. [7]

Q. How did you figure that?

A. Pacing if off.

Q. Did you observe any tire marks at the scene of the accident?

A. Yes, there were swerve marks from the car that's crossways of the north-bound lanes, to where the other vehicle was situated.

In other words, the car—the red car there, as it swerved across the road, left marks on the pavement.

Q. Would you indicate those on this plat with this red chalk? A. (Witness complies.)

Q. Did you observe any skid marks south of the car that you have marked here as the green car?

A. No.

Q. Did you observe any skid marks in the south-bound lane, north of the car?

A. No, we observed no skid marks other than what I have termed as swerve marks between these two places.

Q. You have indicated that this red car, I think you have said, was the taxi? A. Yes, sir.

Q. Did you talk with the driver of the taxi at that time?

(Testimony of Francis K. DeVries.)

A. Yes, but I am not sure whether I talked to him at the scene or at the hospital. I'm sure I talked at the hospital but I'm not positive if I talked to him at the scene. [8]

Q. You are sure you talked to him at the hospital and you think you may have talked to him at the scene? A. That's right.

Q. Did he make any statement to you with regard to how the accident occurred? A. Yes.

Q. What did he say?

A. He stated he suddenly saw two headlights directly before him in his lane, so he tried to swerve to the left and that's all he remembered.

Q. Do you have any recollection of anything else that he said? A. No, I haven't.

Mr. Fulkerson: I have no further questions.

Cross-Examination

By Mr. Chapman:

Q. Officer, do you recall what make of car that green car is you have depicted on the diagram there?

A. The green car was an old model Studebaker sedan; 1929 or 1930 model.

Q. And I think, officer, you said that car was driven by a man named Cutler, is that correct?

A. That's correct.

Q. Did you have any conversation with him at the scene of the accident? [9]

(Testimony of Francis K. DeVries.)

A. Not at the scene. At the Moffett Field dispensary, he was contacted.

Q. When did you see him?

A. Immediately after the accident.

Mr. Chapman: Cutler is not a part to this action, I believe, is he?

Mr. Fulkerson: No, he is not.

Q. (By Mr. Chapman): Officer, you have explained these red lines reading from the green to the red vehicle, as swerve marks. In your opinion, were those swerve marks made by the cab after the collision or were they made by the Studebaker?

A. No, they were made by the cab after the collision.

Mr. Fulkerson: I have some photographs here.

Q. (By Mr. Chapman): Officer, I show you what purports to be a photograph of a taxicab taken at the scene of the accident and will ask you if you can recognize that as a fair reproduction of the appearance of the cab as you saw it after the accident? A. I imagine that's the car.

Mr. Chapman: May this be admitted as Defendants' first exhibit, your Honor?

Mr. Fulkerson: No objection.

The Court: Let it be admitted and marked.

The Clerk: Defendants' Exhibit A admitted and filed in evidence. [10]

(Whereupon the photograph heretofore referred to was admitted into evidence and marked Defendants' Exhibit A.)

(Testimony of Francis K. DeVries.)

Q. (By Mr. Chapman): Now, officer, I show you another photograph, purported to have been taken at the scene of the accident, purporting to show an overturned automobile in the north-bound lanes, as you have illustrated on the diagram, and I will ask you if you recognize that as the overturned car that you have already illustrated on the diagram?

A. I believe that's the scene, all right.

Mr. Chapman: May this be admitted as defendants' second exhibit?

Mr. Fulkerson: No objection.

The Court: Let it be admitted and marked.

The Clerk: Defendants' Exhibit B admitted and filed in evidence.

(Whereupon photograph above referred to was admitted and filed into evidence as Defendants' Exhibit B.)

Q. (By Mr. Chapman): Officer, I show you another picture depicting the same as Defendants' Exhibit B, a little closer up. I will ask you if you recognize that as the overturned Studebaker at the scene of the accident in the north-bound lane?

A. Yes, sir.

Mr. Chapman: May this be admitted as defendants' third [11] exhibit, your Honor?

Mr. Fulkerson: No objection.

The Court: It may be marked next in order.

The Clerk: Defendants' Exhibit C admitted and filed in evidence.

(Testimony of Francis K. DeVries.)

(Whereupon photograph referred to above was marked Defendants' Exhibit C and admitted and filed into evidence.)

Q. (By Mr. Chapman): Officer, I show you a further photograph purported to have been taken on the spot, the evening of the accident, showing what is evidently a swerve mark from one of the north-bound lanes, across the double center line and will ask you if you recognize that as the beginning of the swerve marks that you have illustrated on the diagram? A. Yes, sir.

Mr. Chapman: This is offered in evidence, likewise, as Defendants' Exhibit D, your Honor.

The Court: It may be admitted.

The Clerk: Defendants' Exhibit D admitted and filed in evidence.

(Whereupon photograph above referred to was marked Defendants' Exhibit D and admitted and filed into evidence.)

Q. (By Mr. Chapman): Officer, do you have your report with you? May I see it a moment, [12] please?

According to your report, officer, the driver of the other car involved, which is identified as the Studebaker, I believe, was Dallas Cutler, is that correct? A. That's right.

Q. And he is the one you have designated as Car No. 1 in your report? A. Yes.

Q. You didn't have any conversation with him

(Testimony of Francis K. DeVries.)

at the scene, but you talked to him later, is that correct? A. That's right.

Q. Officer, is this report and memorandum that accompanies the report made in the usual course of business? A. That's right.

Mr. Chapman: This, if your Honor please, is offered in evidence under the Business Records as Evidence Act.

Mr. Fulkerson: If the Court please, I would object to the offer of the entire exhibit into evidence for the reason that it contains, except for what the officer has already testified to—the only thing it would contain is a hearsay statement that would not be admissible if the officer were to testify to it right now. On that ground, I don't think it is entitled to come into evidence.

The Court: I am not familiar with the contents.

Mr. Chapman: Yes, I understand, of course. Well, it is true, as counsel says, that the report does contain purported [13] interviews of other witnesses, who probably will not be available for this trial. It may be that there is merit to his objection on that particular point.

I might ask the officer this:

Q. (By Mr. Chapman): Did you make any recommendation following the occurrence of this accident and following the inquest that was held? Don't answer until counsel has a chance to object.

Mr. Fulkerson: It is all right with me if he says yes or no. I will object to the next question.

(Testimony of Francis K. DeVries.)

Q. (By Mr. Chapman): Did you make any recommendation as to the disposal of the case?

Mr. Fulkerson: Just a moment. If you will, just answer that yes or no.

The Witness: No.

Q. (By Mr. Chapman): Tell us what recommendation or recommendations you made?

Mr. Fulkerson: Just a moment, please. I will object until I find out the basis upon which he made his recommendations. If I might inquire, did he make his recommendation on the basis of some information received from a witness at the scene who is not a party to this action?

The Court: You may inquire, if you wish.

Mr. Chapman: Take him under voir dire, if you wish.

Q. (By Mr. Fulkerson): Mr. DeVries, you have mentioned that you made a recommendation. I will ask you if the basis of [14] that recommendations was information which you received from a witness to the accident who was not the driver of—who was not a party to this case? A. That's right.

Mr. Fulkerson: On that basis I will object to the question as calling for the conclusion and based upon hearsay.

The Court: I don't get the full import of this recommendation. Recommendation to who or to what?

Mr. Chapman: For further possible action on the part of the parties, your Honor.

Mr. Fulkerson: For a criminal prosecution.

(Testimony of Francis K. DeVries.)

The Court: The objection will have to be sustained.

Mr. Chapman: Very well, your Honor. Thank you for coming, officer. That is all I have.

Mr. Fulkerson: Just a second. I would like to look at those pictures, if I might.

Mr. Chapman: I will return your report, officer.

The Witness: Thank you.

Redirect Examination

By Mr. Fulkerson:

Q. I think you have already testified, Mr. DeVries, that this defendants' Exhibit D, the swerve marks, show right behind where you are standing? A. That's right.

Q. What is this? [15]

A. That's debris from the accident, oil, water, gasoline and so forth.

Q. Is this after or before this car was towed away?

A. I believe that this picture was taken after this car was removed from the highway.

Mr. Fulkerson: Let the record show we have been referring to the Studebaker.

Q. (By Mr. Fulkerson): The picture that is shown in Defendants' D is taken from about the spot where the car, the overturned car, is shown in Defendants' C? A. Yes.

Q. And we also see the swerve marks to which you have referred in Defendants' C?

(Testimony of Francis K. DeVries.)

A. That's right.

Mr. Fulkerson: I think that's all.

Recross-Examination

By Mr. Chapman:

Q. I have one more question, officer, if I may. When you arrived at the scene of the accident, you found debris in various lanes of the highway, did you not? A. Yes.

Q. Did you find debris in both Lanes 1 and 2, north-bound section of the highway?

A. Just a second, please. I have here, "Debris was scattered over the width of the Bayshore." [16]

Q. And the car was overturned at the point indicated on the photograph and also on the diagram, by the green designation?

A. That's right.

Q. In your opinion, was that the point of the impact? A. Yes.

Mr. Chapman: Thank you, officer. That's all I have.

Mr. Fulkerson: I have no further questions.

(Witness excused.) [17]

Monday, November 2, 1953, 2:00 P.M.

Mr. Chapman: May I proceed, your Honor?

The Court: Yes.

Mr. Chapman: Mr. Goodrick, will you come forward, please?

ROBERT JAMES GOODRICK

one of the defendants, called as a witness in his own behalf, being duly sworn, testified as follows:

The Court: What is your full name, please?

The Witness: Robert James Goodrick.

The Court: Where do you reside?

The Witness: 44 Dixmyth, Cincinnati, Ohio.

The Court: Your business or occupation?

The Witness: Insurance salesman.

The Court: Take the witness.

Direct Examination

By Mr. Chapman:

Q. Mr. Goodrick, you are one of the defendants in this case and I understand you have just arrived from Cincinnati to testify in this case, is that correct? A. Yes.

Q. Mr. Goodrick, directing your attention to the month of July, 1950, were you in the employ of the Mission Taxicab Company of San Jose, California, at that time? [2*] A. Yes.

Q. And in what capacity?

A. I was a driver.

Q. How long had you been a taxi driver for the Mission Taxicab Company at that time?

A. About four months.

Q. And for how long had you been operating automobiles before that time?

A. About three months, I believe.

Q. Operating automobiles, not only taxicabs.

A. About six years.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Robert James Goodrick.)

Q. What is your age at this time, Mr. Goodrick?

A. 26.

Q. Now, Mr. Goodrick, directing your attention to the late evening hours or early morning hours of July 30, 1950, did you have occasion to pick up two servicemen in San Jose and drive them to Moffett Field? A. Yes.

Q. At about what time did you pick these men up? A. About 2:15.

Q. A.M.? A. In the morning.

Q. Where did you pick them up?

A. First and Santa Clara in San Jose. [3]

Q. What kind of a cab were you operating?

A. I was driving a Yellow Cab, number 112.

Q. Had you operated that cab before?

A. Yes, sir.

Q. For about how long had you been operating that particular cab? A. About three months.

Q. Will you tell us whether or not the cab was in good mechanical condition? A. Yes, it was.

Q. Were the lights, brakes, steering apparatus all right? A. Yes.

Q. Now, after you picked up these two passengers at First and Santa Clara, what route did you take toward Moffett Field?

A. I came out to Bayshore Highway directly and then up Bayshore Highway.

Q. Before turning onto Bayshore Highway, did you go to First Street? A. Yes.

Q. Did you have occasion to make any stops other than traffic stops after you once picked these

(Testimony of Robert James Goodrick.)

two servicemen up before you reached the scene of the accident? A. Yes.

Q. Where did you stop? [4]

A. I stopped at Don's Villa.

Q. Where is that located?

A. I don't know the exact address.

Q. Someplace out on First Street?

A. Yes, sir.

Q. What was the occasion of stopping there?

A. There was a man having trouble with two drunks, so I called the office.

Q. You stopped and called the dispatcher?

A. On my radio.

Q. Then did you go back to the car and proceed on your trip? A. Yes, sir.

Q. What route did you take after you got to Bayshore? Straight up Bayshore? A. Yes.

Q. Is it your understanding that Bayshore Highway runs generally north and south? A. Yes.

Q. We have a diagram on the board, Mr. Goodrick, which I previously showed to you. Is that clear to you? A. Yes.

Q. North is at the top and south is at the bottom? A. Yes.

Q. As you turned into Bayshore and proceeded northward, [5] in what lane of travel were you driving? A. In the first lane, going north.

Q. By that do you mean what we call the outside lane? A. Outside lane.

Q. What were the weather conditions that night?

A. Clear and moonlight.

(Testimony of Robert James Goodrick.)

Q. The moon was shining, was it? A. Yes.

Q. Were the pavements dry? A. Yes.

Q. No low fog or anything of that kind?

A. No fog.

Q. As you proceeded north on Bayshore towards the scene of the accident, at approximately what speed did you travel?

A. About 55; not to exceed.

Q. Did you have a speedometer on your cab?

A. Yes, sir.

Q. Was it working? A. Yes.

Q. You have occasion to look at it at all?

A. I don't know.

Q. Were the lights burning on your instrument board?

A. No, there was moonlight on it. I did look at it.

Q. Did you have occasion to pass any of the northbound traffic as you proceeded toward Moffett Field? [6] A. Two or three cars; not many.

Q. What was the condition of traffic generally that night? A. Moderately light.

Q. Now, at any time while driving these two men toward Moffett Field, did either of them protest to you about the speed at which the cab was being operated? A. No.

Q. Did you have any conversation with these men or either of them as you drove towards Moffett Field?

A. A few casual words, but no conversation.

(Testimony of Robert James Goodrick.)

Q. Did you at any time turn your head away from your view of the road and talk to them?

A. No.

Q. Now, as you approached the scene of the accident how far would you say it was from the last car you had passed going north, if you recall?

A. I don't know.

Q. Did you see the other car that was in the collision with you before the accident occurred?

A. I got an impression that it was there; just instantly the lights came on.

Q. You say you got an impression there was an object there and then some lights came on? [7]

A. Yes, it seemed like there was reflection from something. It could have been my lights or the moonlight, I don't know.

Q. Followed by that, you saw some lights go on?

A. Immediately.

Q. How far apart would you say the other vehicle and your cab were when you saw these lights go on? A. About 85 to a hundred feet.

Q. At that time, were you still in the outside lane going north? A. Yes.

Q. And your speed was about what at that time?

A. Not exceeding 55.

Q. Could you tell at that time whether the other vehicle was stopped or moving? A. No.

Q. Tell us what you did, if anything, at that time, when you saw those lights?

A. I tried to swerve to the left to get in lane two, but I couldn't get clear in time.

(Testimony of Robert James Goodrick.)

Q. Was this a collision between the other car and your car? A. Yes.

Q. What parts of the two cars came together?

A. He came in just behind the front bumper and sideswiped [8] me.

Q. Mr. Goodrick, I wish to show you a photograph, which is Defendant's Exhibit A in evidence, and I will ask you if this is a fair reproduction of the appearance of your cab after the collision?

A. Yes.

Q. Of the damage done to it? A. Yes.

Q. Let me ask you this: Were you blacked out at the time of the collision? Were you injured yourself in the collision? A. Yes.

Q. Were you knocked out? A. Yes.

Q. Do you recall anything that happened after the collision? A. No.

Q. Did you ever see this car afterwards?

A. Yes.

Q. Because this picture was taken at the scene of the accident where you saw it there, was that its general appearance? A. Yes.

Q. You say, Mr. Goodrick, that you blacked out or were knocked out at the time of the collision? Where were you when you came to? [9]

A. I came to in the hospital.

Q. You were in the hospital; so that what went on from the time of the collision up to the time you woke up in the hospital, you don't know except what you have been told, is that correct?

A. That's correct.

(Testimony of Robert James Goodrick.)

Mr. Chapman: You may cross-examine.

Cross-Examination

By Mr. Fulkerson:

Q. You said that you didn't have your lights on your instrument panel? A. Yes, I said that.

Q. Were you able then to observe the speed?

A. Yes, it was moonlight.

Q. You mean the moon was sufficiently bright that you could see the instrument panel inside your car?

A. Yes, it had a luminous dial on the arm.

Q. And how frequently did you look at your instrument panel? A. I don't know.

Q. Is that your customary practice, to drive without lights on the instrument panel?

A. Yes, it cuts down the glare.

Q. How bright was this moonlight? Can you give me any idea? How far could you see in the moonlight? [10]

A. I could see silhouettes plainly. If there was anything behind something else, you couldn't see it.

Q. I think you have described the traffic as moderately light, is that correct? A. Yes.

Q. How far would the cars be spaced under that definition?

A. One to a tenth of a mile or greater.

Q. And was the traffic the same in each direction in terms of intensity? Was it just as heavy coming south as it was going north or just as light?

(Testimony of Robert James Goodrick.)

A. Yes.

Q. You would say then that the cars coming south, there would be one every one-tenth of a mile?

A. Approximately.

Q. You have testified that your headlights were in good condition? A. Yes.

Q. How far would they shine?

A. I don't know. I have never tested them.

Q. How do you know they were in good condition? A. I said they were standard.

Q. In other words, in your opinion, their beam was that of the standard car, is that correct?

A. Yes.

Q. How were you driving? With the high or low beam? [11]

A. I was driving with the low beam.

Q. Was that because the moonlight was bright?

A. No, because there was approaching traffic.

Q. Did the occupants of your car make any objection to your stopping at the fight? A. No.

Q. They didn't say anything to you about it?

A. No.

Q. And they never said anything to you about the speed at which you were driving? A. No.

Q. Do you recall having a conversation with the highway patrol officer that investigated the accident?

A. I recall talking to one in the hospital.

Q. Do you recall telling him that you suddenly saw two headlights directly before you in your own lane? A. Yes.

(Testimony of Robert James Goodrick.)

Q. You say now that you felt that you saw the car before you saw the headlights? A. Yes.

Q. Have you always felt that way?

A. It was just an impression but the headlights came on almost as quickly as my mind could register that there was an object there.

Q. Do you remember testifying before the coroner's jury in [12] Alameda on August 11, 1950?

Mr. Chapman: You may read any part of the transcript. It is so stipulated the questions and answers are given as appear in the copy.

Q. (By Mr. Fulkerson): Do you recall giving this testimony? Page 3; I will read the question and answers now. This is by the coroner:

"I have already read the data pertaining to the history of this case. Will you kindly tell the jury just about what happened as you recall on this occasion?

"Answer. Well, I picked the sailor up about 2:15 in downtown San Jose. I started off for Moffett Field with them.

"Question. 2:15 in the morning?

"Answer. 2:15 in the morning, yes—well, a few incidents on the way, but beyond that, as I was approaching—well, it was approximately 2:30 when I was clear in the outside lane on Bayshore Highway, which is a four lane highway, and out of nowhere two headlights just appeared and obviously had been turned on and they couldn't have been turned on in the road or I would have seen them. They were approximately 85 to a hundred feet when

(Testimony of Robert James Goodrick.)

I first noticed them and I tried to pull to the left in the [13] inside lane and then that is where the collision occurred.''

Do you recall making that statement?

A. Yes.

Q. How long had you been in the outside lane, if you can recall, when you saw this car, these two headlights appear in front of you?

A. I don't remember.

Q. You say you don't remember how long since you had passed the last car?

A. That is right. It had been quite awhile.

Q. Now, had you been driving at all times in the far right-hand lane, what we have indicated on this chart as lane north 1? A. Yes.

Q. Ever since you passed the last car, you had been in the outside, north-bound lane, designated as north 1? A. Yes.

Q. And as I understand it, the headlights appeared before you in that lane?

A. That's correct.

Q. And so far as you could determine, they might have been stopped at the time you saw them?

A. Yes.

Q. How far in front of your car could you see?

A. I don't know. [14]

Q. Could you see 500 feet?

A. Not with my lights, no.

Q. Could you see 500 feet with the moonlight?

A. It would depend upon the object.

Q. Could you see a pedestrian at 500 feet?

A. No.

(Testimony of Robert James Goodrick.)

Q. Could you see a car at 500 feet?

A. With no lights, no.

Q. Could you see a car at 300 feet?

A. I don't know.

Q. What is your best estimate of the distance that you could have seen a car?

Mr. Chapman: That is objected to as having been asked and answered. The witness said he didn't know. This merely calls for speculation, I believe, your Honor.

Mr. Fulkerson: I will reframe the question. He stated he doesn't know whether he could have seen 300 feet. He feels he could not have seen 500 feet.

The Court: The night in question?

Mr. Fulkerson: I will reframe the question.

Q. On the night in question, and at the place of the accident, what, in your opinion, was the distance at which you could see an unlighted car ahead of you? A. I don't know.

Q. Are you sure you weren't driving more than 55 miles an [15] hour? A. I am sure.

Q. Why are you so sure you weren't driving more than 55?

Mr. Chapman: That is objected to as being argumentative.

The Court: He may answer if he knows.

The Witness: After you drive a car for a period of time, you feel it, then you know when you are exceeding a speed. If you check your speedometer occasionally, you won't vary more than one or two miles an hour.

(Testimony of Robert James Goodrick.)

Q. (By Mr. Fulkerson): Then, I understand you are basing your testimony that you were driving not over 55 miles an hour on the feeling that you had developed as to the speed of the car and I also assume that you are telling me that you checked occasionally with your speedometer, is that correct? A. Yes.

Q. How frequently did you check your speedometer? A. I don't know.

Q. Would you say once or twice or ten times during the trip? A. I don't know.

Q. Are you sure you checked it? A. Yes.

Q. Where is the speedometer placed in the car that you were driving?

A. Directly in front of me on the dash. [16]

Q. Is it above the steering post? A. Yes.

Q. Directly above the steering post?

A. I don't know that.

Q. Are you sure it isn't to the right of the steering post? A. I don't know exactly.

Q. Is there a hood over the speedometer, a little sun visor? A. I don't know.

Q. There could be, couldn't there?

A. It's possible.

Q. What was the make of this car?

A. '48 Packard.

Q. '48? A. I believe.

Q. Might it be a '46?

A. It could have, I don't know.

Q. What other instruments were on the instrument panel besides the speedometer?

(Testimony of Robert James Goodrick.)

A. Standard equipment; gas, amps, temperature.

Q. Is it your custom occasionally, when you are driving, to look at those to see if the engine is functioning properly? A. Yes. [17]

Q. Did you do that, that night?

A. That night, yes.

Q. You remember doing it?

A. That night.

Q. Did you do it on the trip after you had picked up the two sailors and were taking them to Moffett Field? A. I don't know.

Q. I think you stated you have no idea of the speed of the car that was coming towards you, is that right? A. That's correct.

Q. How far away was the nearest south-bound car at the time you first saw the two headlights appear in front of you?

A. I don't know; not too close.

Q. Would you say that they were more than 500 feet away? A. Yes, I think they were.

Q. Could they be as much as a thousand feet away? A. Yes.

Q. What were you looking at when you were driving? A. At the road.

Q. At all times? A. Yes.

Q. You never took your eyes off the road?

A. No.

Q. You never did? You just told us you looked at the [18] speedometer several times.

A. You speak of the road or functions of the road?

(Testimony of Robert James Goodrick.)

Q. I am talking about the road. I understood you were talking about the road. We want to find out the facts.

A. Then, I would have to correct that statement. No, I wasn't looking at the road all the time, but the function of the road or the automobile, which would be just a split second.

Q. Then, as I understand, the only place that you looked during—let's specify it. I am talking about the time that you were driving along the Bayshore, after you had turned on and left the scene of the fight and, as I understand, from that point on, until the time of the accident, you never took your eyes off the road except for the proper functions of the car, which I understand you to mean, is glancing at the speedometer and glancing at the other instruments on the panel, is that correct?

A. Other than when I turned on Bayshore.

Q. I understand that. I am talking about after you got on Bayshore. A. Yes.

Q. You never turned around and talked to your passengers in the rear seat? A. No.

Q. Did you look off to the side? [19]

A. No.

Q. Could you see mountains in the moonlight?

A. I could sense them.

Q. But you didn't look off to see if you could see them? A. No.

Q. What is on the right side of the Bayshore

(Testimony of Robert James Goodrick.)

Highway, let's say, at the scene of the accident, do you remember?

A. I remember a wide shoulder; that's about all I recall.

Q. You don't remember whether there were trees on the right side or houses or anything else?

A. No.

Q. How do you turn off the lights on the instrument panel in that car?

A. I don't remember.

Q. Had you had the lights on on the instrument panel when you were driving around town?

A. No.

Q. You habitually keep the lights off?

A. Yes.

Q. Do you recall also giving this testimony—this is on page four, Mr. Chapman—before the coroner's jury on August 11, 1950, in Alameda? This was in reply to the following question from a juror:

"Question. Mr. Goodrick, this man approaching, it was head-on? [20]

"Answer. That is correct, sir, yes.

"Question. And then he was in the wrong lane altogether?

"Answer. Yes, he was. He was clear on the wrong side of the highway, as far from the right side of the highway as could be."

You recall making that statement?

A. Yes.

Q. That is the fact too, I take it?

A. Yes.

(Testimony of Robert James Goodrick.)

Mr. Fulkerson: I have no further questions.

Redirect Examination

By Mr. Chapman:

Q. Just one more question, Mr. Goodrick, I omitted to ask you.

After picking these two servicemen up, did you at any time suggest they go to a dance hall or anything of that kind? A. No.

Q. And one more question I don't think appears in the record.

Do you know what speed Bayshore Highway is sign posted for, if it is sign posted at all?

A. Yes.

Q. What is it, please? [21] A. 55.

Mr. Chapman: Thank you. That is all.

Mr. Fulkerson: No further questions.

May this witness be excused, your Honor? He just arrived by plane and I think we are both through with him.

I have no reason to detain him.

Mr. Chapman: You are excused, Mr. Goodrick. The defendants rest, your Honor.

* * *

[Endorsed]: Filed April 20, 1954. [22]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for appellant:

Complaint.

Order appointing guardian ad litem.

Answer of defendants Mission Taxicab Company, Inc., a corporation, and Robert Goodrick.

Stipulation for taking deposition.

Deposition of Earl Brantley.

Order for entry of judgment.

Findings of fact and conclusions of law.

Judgment.

Notice of entry of judgment.

Notice of appeal.

Cost bond on appeal.

Designation of contents of record on appeal.

Condensed statement in narrative form prepared by plaintiff of all the testimony of all the witnesses.

Statement of points on which appellants intend to rely on appeal.

Appellees' notice to appellant re record on appeal under Rule 75(c).

Stipulation between appellants and appellees as to record on appeal under Rule 75(f).

Deposition of Robert Goodrick's testimony.

Testimony of Francis K. DeVries.

Plaintiffs' exhibits 1 & 2, inclusive.

Defendants' exhibits A to D, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of May, 1954.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ WM. C. ROBB,
Deputy.

[Endorsed]: No. 14350. United States Court of Appeals for the Ninth Circuit. Doris Bernice Shackelford, Allan Ray Shackelford and Larry William Shackelford, Minors, by Doris Bernice Shackelford, Their Guardian ad Litem, Appellants, vs. Mission Taxicab Company, Inc., a Corporation, Robert Goodrick and Buford H. Shipman, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 10, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14350

DORIS BERNICE SHACKELFORD and ALLEN RAY SHACKELFORD, and LARRY WILLIAM SHACKELFORD, Minors, by DORIS BERNICE SHACKELFORD, Their Guardian ad Litem,

Appellants,

vs.

MISSION TAXI COMPANY, a Corporation, ROBERT GOODRICK and BUFORD H. SHIPMAN,

Respondents.

STATEMENT OF POINTS AND DESIGNATION OF RECORD IN ABOVE CASE

Pursuant to the requirements of Rule 17 (6) appellants hereby adopt the statement of points upon which appellants intend to rely on appeal and the designation of record which appears in the type written transcript of record.

ROCKWELL & FULKERSON,

/s/ HAROLD H. FULKERSON,
Attorneys for Appellants.

[Endorsed]: Filed May 14, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO PORTION OF RECORD WHICH IS MATERIAL TO THE CONSIDERATION OF THE APPEAL

Pursuant to the provisions of Rule 75(1) of the Rules of Civil Procedure and to the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit it is stipulated by and between the parties hereto, acting through their respective attorneys of record that the following portions of the record are those material to the consideration of the appeal:

1. The Complaint and the Answer.
2. The Findings of Fact and Conclusions of Law.
3. The Judgment.
4. The Notice of Appeal.
5. The testimony of the witnesses F. K. DeVries and Robert Goodrick in question and answer form as contained in the Reporter's transcript, and the testimony of the witness Earl Brantley in question and answer form as contained in the deposition of said witness.
6. All the exhibits introduced by both parties.
7. The following stipulations of the parties as heretofore set forth in the condensed statement in narrative form prepared by plaintiff of all the testimony of all the witnesses and in the stipulation between appellants and appellees as to record on appeal under Rule 75(f):

(a) That none of the testimony of Mrs. Doris Bernice Shackelford was at all material to the issue of negligence on the part of defendants and appellees; that the issue of damages was not determined by the trial court, said court having rendered its decision of no liability on the basis of a finding of no negligence.

(b) That William Thomas Shackelford, deceased, sustained injuries in the collision involving the taxicab in which he was riding as a passenger from which injuries he died.

(c) That there was no further accident involving the taxicab or its occupants, but that there was another later accident involving a truck and another car.

(d) That on the evening of July 29, 1950, within a few miles of the location of the accident the moon rose at 9:11 p.m., Daylight Savings Time and set on the morning of July 30, 1950, at 7:41 a.m., Daylight Savings Time, and that the moon was full on the preceding night, namely, the evening of July 28 at 9:17 p.m., Daylight Savings Time.

/s/ HAROLD H. FULKERSON,
ROCKWELL & FULKERSON,
Attorneys for Appellants.

BRONSON, BRONSON, and McKINNON,
Attorneys for Respondents.

[Endorsed]: Filed May 26, 1954.

No. 14,350

United States Court of Appeals

For the Ninth Circuit

DORIS BERNICE SHACKELFORD, ALLAN RAY SHACKELFORD and LARRY WILLIAM SHACKELFORD, Minors, by Doris Bernice Shackelford, Their Guardian ad Litem,

Appellants,

vs.

MISSION TAXICAB COMPANY, INC., a Corporation; ROBERT GOODRICK and BUFORD H. SHIPMAN,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,350

United States Court of Appeals
For the Ninth Circuit

DORIS BERNICE SHACKELFORD, ALLAN RAY SHACKELFORD and LARRY WILLIAM SHACKELFORD, Minors, by Doris Bernice Shackelford, Their Guardian ad Litem,

Appellants,

vs.

MISSION TAXICAB COMPANY, INC., a Corporation; ROBERT GOODRICK and BUFORD H. SHIPMAN,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

BASES OF JURISDICTIONS.

1. The United States District Court for the Northern District of California, Southern Division, had jurisdiction in this case under the provisions of 28 U.S.C., Section 1332(a)(1) whereby jurisdiction is conferred in civil actions where the matter in

controversy exceeds the sum of $3000.00 and is between citizens of different states. The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment in question under the provisions of 28 U.S.C., Section 1291.

2. Diversity of citizenship of plaintiffs from all defendants together with the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00, is pleaded in paragraph VII of the complaint (R. pp. 5-6).

3. Defendants' admission of the facts pleaded in paragraph VII of the complaint is contained in paragraph I of the answer (R. p. 11).

PRELIMINARY ABSTRACT OF THE CASE.

Appellants brought this action in the District Court for damages for wrongful death. The action arose out of a collision involving a taxicab and a private automobile which occurred on July 30, 1950 in Santa Clara County, California. The collision occurred at 2:30 A.M., on a bright, moonlight night when the defendant taxicab driver while proceeding northerly in the most easterly lane of a straight, level, four-lane highway first observed a Studebaker automobile facing southerly in the most easterly lane of the highway (head-on to the taxicab) only 85 to 100 feet away. William T. Shackelford, deceased, was a passenger for hire in the taxicab. He died as a result of the injuries sustained in the collision. Appellants, Doris

Shackleford, for herself and as guardian *ad litem* of her two children, are the heirs of William T. Shackelford, deceased. Appellees, Mission Taxicab Company, Inc. and Robert D. Goodrick were the owner and driver respectively of the taxicab. The action was tried by the Court without a jury after which the Court, per Chief District Court Judge Michael J. Roche, found that appellees were not reckless, careless or negligent in the operation of the taxicab. The Court then entered its judgment in favor of appellees and against appellants. This appeal has been taken from that judgment on the grounds that (1) the evidence does not support the findings of fact and conclusions of law, and (2) the findings do not support the judgment.

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in making its findings XI, XII, and XIII (R. p. 34) to the effect that appellees did not negligently, carelessly or recklessly operate the taxicab.

2. The District Court erred in making its finding XIV (R. p. 35) that appellees operated the taxicab "with all due care and caution".

3. The District Court erred in making its finding XIV (R. p. 35) "that said Studebaker sedan automobile so operated by said Dallas Cutler entered said easterly portion of said U.S. High 101 within such close proximity to the approaching taxicab operated

by said defendant Robert Goodrick that said defendant Robert Goodrick was unable to avoid colliding with said Studebaker".

4. The District Court erred in making its finding XIV (R. p. 35) that "the injuries sustained by said William Thomas Shackelford, deceased, and the damages sustained by plaintiffs were wholly and solely, directly and proximately caused by the recklessness, carelessness and negligence of said Dallas Cutler".

5. The District Court erred in rendering judgment for the appellees and not for the appellants (R. pp. 37-38).

STATEMENT OF FACTS TO BE DISCUSSED.

On July 30, 1950 William Thomas Shackelford, deceased, was an aviation radioman 1st class, attached to the United States Naval Air Station, Moffet Field, in Santa Clara County, California (R. pp. 14-15). At about 2:15 A.M. on that date appellee, Robert Goodrick, driving one of appellee Mission Taxicab Company Inc.'s taxicabs picked up the deceased, William T. Shackelford, and Earl Brantley, another Naval enlisted man, in San Jose, California and commenced transporting them for hire toward U.S. N.A.S., Moffet Field by way of U. S. Highway 101 (also known as the "Bayshore" Highway) (R. pp. 56-57). At about 2:30 A.M. on said date the taxicab driven by appellee Goodrick on U. S. Highway 101 was involved in a collision with a Studebaker sedan

automobile (R. p. 43 and p. 48). In this accident deceased Shackelford sustained fatal injuries (R. p. 76).

At the point where the accident occurred, the highway is straight and level and runs generally north and south (R. p. 44). It is a four lane highway with eleven foot lanes and the two northbound lanes are separated from the two southbound lanes by a double line (R. p. 44). The shoulders on each side of the highway are twenty feet wide (R. p. 44).

At the time of the accident the road was dry (R. p. 59), the night was clear (R. p. 58) and the moon was bright (R. p. 62), it being within four minutes of midway between moonrise and moonset on the night following the full moon (R. p. 76).

Immediately prior to the accident the taxicab was being driven north in the outside (or most easterly) northbound lane (R. p. 58). It had been in this lane for "quite a while" (R. p. 65). Then at a distance of 85 to 100 feet directly in front of him in the outside (most easterly) northbound lane the taxicab driver, appellee Goodrick, first saw the two headlights of a Studebaker automobile (R. pp. 60, 63-64 and p. 70). The taxicab driver, appellee Goodrick, could not tell whether the Studebaker was stopped or moving (R. p. 60). The taxicab driver, appellee Goodrick, swerved to his left and the two vehicles collided at a point midway between the outside and inside northbound lanes (defendant's exhibits B and C) (R. pp. 45 and 55). There were no skid marks made by

either car prior to the point of collision (R. p. 47). After the collision the Studebaker was resting on its side at the point of impact (R. p. 55) and the taxicab came to rest across the highway on the westerly shoulder 160 feet northerly of the point of impact (R. pp. 46-47).

The lights of the taxicab were in good condition and their beam was that of the standard car (R. p. 63). At the time of the accident the lights of the taxicab were on low beam (R. p. 63) and the nearest southbound car observed by the taxicab driver (other than the Studebaker) was more than 500 feet away (R. p. 68).

There is no evidence as to (1) from whence came the Studebaker; (2) how long it had been in the northbound lane prior to the time it was seen by the cab driver, and (3) the speed of the Studebaker.

ARGUMENT.

Appellants do not seek on this appeal to have the evidence re-weighed. Appellants recognize and agree that for the purposes of this appeal all the evidence favorable to appellees must be considered to be true and further that every favorable intendment must be given such evidence. Conceding this, appellants contention which will be argued below is as follows: As a matter of law the findings that appellees were not negligent in the operation of the taxicab are not supported by the evidence. This follows from the

facts (1) that appellants were at all stages of this case entitled to the benefits of the doctrine of *res ipsa loquitur* and (2) that appellees failed as a matter of law to offset or balance the inference of negligence thus raised. Appellants further contend that as a matter of law the evidence produced by appellees affirmatively proves appellees to have been negligent.

I. THE FINDINGS THAT APPELLEES WERE NOT NEGLIGENT IN THE OPERATION OF THE TAXICAB ARE NOT SUPPORTED BY THE EVIDENCE AS A MATTER OF LAW.

Appllants submit that the evidence introduced in this case fails as a matter of law to support the findings that appellees were not negligent and that they operated the taxicab with all due care and caution.

A. RES IPSA LOQUITUR COMPELS THE FINDING THAT APPELLEES WERE NEGLIGENT.

1. Res Ipsa Loquitur imposes upon appellees the burden of explaining that the accident could not have been caused by appellees' negligence.

The sifinificance, scope and effect of the doctrine of *res ipsa loquitur* has heretofore been the matter of great confusion in the California Courts. See Prosser, *Res Ipsa Loquitur in California* (1949), 37 Cal. L. Rev. 183. Very recently however, the California Supreme Court undertook a complete review of the problem and in two carefully considered opinions re-

solved all prior confusion and restated clearly and definitely the California Law of *res ipsa loquitur. Hardin v. San Jose City Lines, Inc.* (August 1953), 41 C. (2d) 432, 260 P. (2d) 63. *Burr v. Sherwin-Williams Co.* (April 1954), 42 A.C. 699, 268 P. (2d) 1041.

In California the doctrine of *res ispa loquitur* is applicable in favor of a passenger in a common carrier as against such carrier where the passenger is injured as a result of a collision between the carrier's vehicle and a vehicle operated by a third party. *St. Clair v. McAlister* (1932), 216 Cal. 95, 13 P. (2d) 924; *Dieterle v. Yellow Cab Co.* (1939), 34 C.A. (2d) 97, 93 P. (2d) 17; *Stark v. Yellow Cab Co.* (1949), 90 C.A. (2d) 217, 202 P. (2d) 802. And this is so even though specific proof is produced to show the collision was due to the negligence of the other vehicle—the doctrine still being applicable in favor of the passenger and against the carrier to the effect that the carrier was *also* at fault. *St. Clair v. McAlister* (1932), 216 Cal. 95, 13 P. (2d) 924; *Sloan v. Original Stage Line* (1932), 124 C.A. 317, 12 P. (2d) 465; *Burke v. Dillingham* (1927), 84 C.A. 736, 258 P. 627.

The procedural effect of *res ispa loquitur,* whenever the doctrine applies, is to give rise to a "special kind of inference" in the nature of a rebuttable presumption which the defendant *must* rebut by evidence sufficient to meet or offset it. If the defendant fails to present such evidence sufficient to meet or offset the "special kind of inference" the plaintiff must be given judgment. *Hardin v. San Jose City Lines,*

41 Cal. (2d) 432 at 436, 260 P. (2d) 63 at 65, as further explained in *Burr v. Sherwin-Williams Co.* (1954), 42 A.C. 699 at 705, 268 P. (2d) at 1044.

Applying these rules of law to the present case it follows that the doctrine of *res ipsa loquitur* applies in favor of the appellants and against the appellees raising this "special kind of inference" (in the nature of a rebuttable presumption) that the injury sustained by appellants was caused by appellees' negligence. The burden then shifted to appellees to go forward and produce evidence *sufficient* to *offset* or *balance* this inference.

The question now presented is: "What evidence must appellees produce in order to sustain the burden thus imposed upon them?" One provision of the California Civil Code and three decisions of the California Supreme Court combine to provide a clear and definitive answer to this question.

Section 2100 of the Civil Code of California provides:

> "A carrier of persons for reward must use the *utmost* care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill".[1]

In the *Hardin* case, supra, where the plaintiff was a passenger on a bus the Supreme Court stated that if

[1]All emphasis within quotations supplied by appellants unless otherwise indicated.

the passenger was injured as the result of the operation of the bus:

> "* * * an inference arose that her injury was caused by defendants negligence and that *it was incumbent upon defendant to rebut the inference by showing that it exercised the utmost care and diligence.*." (*citing Calif. C. C. 2100) (41 C. (2d) 432 at 437, 260 P (2d) 63 at 65).

What constitutes a showing by a common carrier of the exercise of the utmost care and diligence was more explicitly set forth by the California Supreme Court in the case of *Bourguignon v. Peninsular Ry. Co.* (1919), 40 C.A. 689 at 694, 181 P. 669 at 671. In that case a passenger in a railroad car was injured when the car was derailed. Judgment for the plaintiff was affirmed on appeal. In denying a petition for a hearing by the Supreme Court, that Court first commented upon an instruction concerning the defendant's burden of proof in rebutting the inference of negligence and then said:

> "* * * The true rule is that where the accident is of such a character that it speaks for itself as it did in this case, and raises a presumption of negligence, the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but

must have been due to some unpreventable cause, although the exact cause is unknown.

In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers *all* causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, *the explanation or care shown,* as the case may be, *must be most satisfactory in the sense that the carrier is held to a very high degree of care.*

But the proof which is required of such explanation or care is a different matter from the explanation or care itself. The explanation or the care shown, if true, may be perfectly satisfactory. The proof of its truth may or may not be satisfactory. On this point the rule is the same as in the case of any other presumption which a defendant must meet, that is, he is not obliged to overcome the presumption by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation or of his contention that he exercised due care in all particulars as to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence".

The law enunciated in the *Bourguignon* case is as sound today as it was on the day the case was decided. The requirements as to the nature of defendants showing were quoted with approval and followed by the

California Supreme Court in *Dierman v. Providence Hospital* (1947), 31 Cal. (2d) 290 at 295, 188 P. (2d) 12 at 14, and by the District Court of Appeal in *James v. American Buslines* (1952), 111 C.A. (2d) 273 at 276, 244 P. (2d) 503 at 504.

It thus appears that to satisfy their burden appellees must produce evidence showing either:

1. A definite cause for the accident in which there exists no element of negligence on the part of appellees; or

2. Such care in all possible respects as necessarily to lead to the conclusion that the accident could not have been caused by want of care on the part of appellees.

Applying this test to the evidence in this case will demonstrate that appellees have failed to sustain their burden.

2. No definite cause for the accident has been shown in which there exists no element of negligence on the part of appellees.

The evidence shows that the collision was caused in part by the fact that the Studebaker was on the wrong side of the highway. From its location it may certainly be inferred that its operator was negligent. But, both by logic and by the established California law it is clear that proof of the probable negligence or even of the indisputable negligence of the operator of the Studebaker can have no probative effect to show that the taxicab driver was free from negligence. *St. Clair v. McAlister* (1932), 216 Cal. 95, 13 P. (2d)

924; *Sloan v. Original Stage Line* (1932), 124 C. A. 317, 12 P. (2d) 465.

(The trial court found that the Studebaker entered the northbound lane within such close proximity to the taxicab that it could not have been avoided. If there were evidence to support this finding appellants would concede the case, but as pointed out hereinafter (at page 18) there is not an iota of evidence on which to support this finding.)

3. The evidence fails to show the exercise of such care in all possible respects by appellees as necessarily leads to the conclusion that the accident could not have been caused by want of care on their part.

In at least two vital aspects the evidence *fails to show* the exercise by appellees of the utmost care and diligence required of them.

(a) The unexplained failure of the taxicab driver to see the Studebaker prior to the time it was only 85 to 100 feet away renders impossible the conclusion that the accident could not have been caused by want of care on the part of appellees.

It is the indisputable evidence that appellee, Goodrick, the driver of the taxicab, failed to see the Studebaker until the two vehicles were only 85 to 100 feet apart (R. p. 60). No explanation of this failure is to be found in the evidence. The evidence shows that the Studebaker was on the wrong side of the highway in the northbound lanes in a visible position prior to the time it was seen by Goodrick.

The Studebaker was in the northbound lanes prior to the time it was seen. This is proved by the testi-

mony that when first seen the Studebaker was *completely* in the outside northbound lane facing "head-on" to the northbound taxicab (R. p. 70). Goodrick's testimony that he did not know whether the Studebaker was stopped or moving is also significant (R. pp. 60 and 65). At the time first seen by the taxicab driver the Studebaker was not moving *laterally* across the northbound lanes. To get where it was when first seen it had to move laterally across one or more of the northbound lanes (depending upon whether it came across the double line or across the twenty foot easterly shoulder). This lateral movement on the northbound lanes occurred prior to the time the Studebaker was seen. It, therefore, follows that the Studebaker must have been on the northbound lanes prior to the time it was seen by Goodrick.

The only evidence in this case bearing upon the question of speed of the Studebaker indicates that the Studebaker was either stopped or going very slowly. This evidence consists of Goodrick's testimony (referred to above) that he couldn't tell whether or not the Studebaker was stopped, together with the evidence of Officer DeVries and the photographs (Defendant's exhibits C and D) showing that after the sideswipe collision the Studebaker was resting on its side *at the point* of impact. When the location of the taxicab in the outside northbound lane is considered in the light of the evidence that it was either stopped or proceeding slowly it follows that the Studebaker was on the northbound lane a relatively long period of time.

The Studebaker was visible to the taxicab driver prior to the time it was seen by him. There was nothing obstructing the taxicab driver's vision of the highway before him. The highway at this location is straight and flat (R. p. 44). The illumination was sufficient to disclose an automobile at a distance greater than 85 to 100 feet. From appellee Goodrick's testimony an inference might be drawn that prior to the moment seen the Studebaker did not have its lights on. But lack of lights on the Studebaker can not explain appellees' failure to see it until only 85 to 100 feet away. It is significant that with the burden of explanation upon him the taxicab driver never testified that lack of lights on the Studebaker prevented his seeing it sooner. Of course, the other testimony in the case shows such an explanation could not be made because even with its lights off the Studebaker was visible at a greater distance than 100 feet. The night of the collision was a clear, bright, moonlight night (R. pp. 58-59 and 76). It was virtually midway between moonrise and moonset on the night following the full moon. Goodrick himself testified that the moon was so bright that not only could he see silhouettes "plainly" (R. p. 62), but that he used only the moonlight to enable him to *read the instruments on the dashboard of his taxicab* (R. pp. 59, 62 and 68). In this connection the further testimony of Goodrick is most significant: He testified he first saw the Studebaker when only 85 to 100 feet away (R. p. 64). He testified he could not see an unlighted automobile in the moonlight 500 feet away, (R. p. 66), but he

testified *he didn't know* whether or not he could see an unlighted automobile in the moonlight 300 feet away (R. p. 66). Therefore, it must follow that he *knew* he could see an unlighted automobile at a distance greater than 100 feet.

The record thus discloses this fatal hiatus in appellees' attempt to show the exercise of such care as in all respects must necessarily lead to the conclusion that the accident could not have been caused by want of their care. This failure entitled appellants to judgment under the rules of law set forth above.

(b) It was negligence per se for appellees to drive the taxicab 55 miles per hour with its lights adjusted to low-beam when the nearest southbound car was more than 500 feet away.

Appellee Goodrick testified that he was driving 55 miles per hour—the maximum permitted on the highway at the location of the accident. He further testified that at the time he first saw the Studebaker the *nearest* southbound automobile was *more* than 500 feet away and was perhaps as much as 1000 feet away.

The California laws requires that a vehicle on the highway at night be equipped with lights (California Vehicle Code Section 618). The law further provides that the lights required shall be so arranged that the driver can select at will between different distributions of light and requires that the upper beam shall be such as to reveal persons and vehicles at a distance of at least 350 feet ahead while the lower beams shall be sufficient to reveal a person or vehicle at a distance of at least 100 feet ahead (California

Vehicle Code Section 648). Section 649 of the California Vehicle Code then provides:

> "(a) Whenever a motor vehicle is being operated on a roadway * * * [at night] * * * the driver shall use a distribution of light, or composite beam directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirements and limitations. (b) Whenever the driver of a vehicle approaches an oncoming vehicle within 500 feet such driver shall use * * * [the low beam] * * *".

Appellee Goodrick's failure to have his lights adjusted to the high beam was a violation of Section 649 of the California Vehicle Code and therefore constituted negligence *per se*. In the case of *Caperton v. Mast* (1948) 85 C.A. (2d) 157, 192 P. (2d) 467, where no approaching car required the dimming of his lights, a truck driving on the low beam was held negligent, the Court holding that

> "* * * reasonable care required him to drive with his lights on high beam, so adjusted as to comply with Section 648 of the Vehicle Code requiring an adjustment which would have revealed persons and vehicles at least 350 feet ahead". 85 C.A. (2d) 157 at 159, 192 P. (2d) 467 at 470.

Surely conduct which is thus held to be a violation of simply "reasonable" or ordinary care (the standard applicable in the *Caperton* case, supra) must in this case be recognized as constituting a most gross and flagrant violation of the *utmost* care.

Obviously where appellees failed to see the Studebaker until only 85 to 100 feet away the explantion which shows a failure to have the taxicab's headlights on high beam utterly fails to show the exercise of such utmost care as to compel the conclusion that the accident could not have been caused by appellees' want of care.

II. THE FINDING THAT THE STUDEBAKER ENTERED THE EASTERLY PORTION OF THE HIGHWAY WITHIN SUCH CLOSE PROXIMITY TO THE APPROACHING TAXICAB THAT APPELLEE GOODRICK WAS UNABLE TO AVOID THE COLLISION IS NOT SUPPORTED BY THE EVIDENCE AS A MATTER OF LAW.

The record in this case contains no evidence to support the finding that the Studebaker entered the easterly portion of the road within such close proximity to the northbound taxicab that the taxicab was unable to avoid the collision.

There is no scintilla of evidence in this case to indicate *when* or *from where* came the Studebaker on the northbound lanes. The only thing known about the Studebaker prior to the collision was that when first seen by the taxicab driver it was completely in the most easterly northbound lane and distant 85 to 100 feet.

The mere fact of the location of the Studebaker on the northbound lanes has no relevancy in indicating either where it came from or how long it had been there when first observed. No doubt the reader of this brief is sitting in a chair. From the fact

alone that the chair is now located in its present position it is impossible to say how long it has been in that position or from what direction it was last moved.

The fact of the collision itself can raise no inference that it was unavoidable. To permit such an inference would require the overruling of the California law of *res ipsa loquitur*. Where the accident itself raises the inference of negligence requiring of the appellee a showing to rebut such inference, the accident itself cannot provide the second inference which rebuts the first. Such a result simply means that no inference of negligence arises in the first place.

Appellants submit that the only evidence in this case pertinent to this question shows that the Studebaker must have been on the northbound lanes not less than a relatively long period of time. This is the only inference that can be drawn from the evidence as to the location of the Studebaker when first seen coupled with the evidence that the Studebaker was either stopped or proceeding slowly.

III. THE EVIDENCE PRODUCED BY APPELLEES AFFIRMATIVELY SHOWS THAT APPELLEES WERE NEGLIGENT.

To this point the argument of appellants has shown that the findings of no negligence on the part of appellees are not supported because the appellees failed to explain away the inference of negligence raised by *res ipsa loquitur*.

In addition, appellants submit that the evidence produced by appellees provides *affirmative proof* that appellees failed to exercise the utmost care and diligence which was their obligation and are thereby proved to be negligent.

The admission by appellee Goodrick, the driver of the taxicab, that while driving 55 miles per hour on a straight, flat, wide, four lane highway on a bright moonlight night he failed to see a car facing him head-on in his most right hand lane until only 85 to 100 feet away is very strong evidence of negligence on his part. Such a failure would constitute a failure to exercise "ordinary", "reasonable" or "due" care expected of drivers of private vehicles. Appellants submit this constitutes an extreme violation of the very high standard of care imposed upon carriers for hire—the standard of *utmost* care.

The further admission by Goodrick that the headlights of his taxicab were on low-beam under such circumstances of speed and approaching traffic as requires, under Section 649 of the California Vehicle Code, the use of the high-beam is, as pointed out above, negligence *per se*. This also is affirmative proof of negligence on the part of appellees. Here is positive proof of conduct by appellees which has been held in the *Caperton* case, supra, to be a violation of the "reasonable" or "ordinary" standard of care imposed on drivers of private vehicles. Surely this is a most gross violation of that *utmost* care to which appellees as carriers for hire must be held.

For the foregoing reasons appellants pray that the judgment heretofore rendered for appellees be reversed and that the case be remanded to the District Court with instructions that judgment be entered for appellants in such amount as said District Court shall find appellants to have been damaged.

Dated, San Rafael, California,
August 11, 1954.

Respectfully submitted,
ROCKWELL & FULKERSON,
HAROLD H. FULKERSON,
Attorneys for Appellants.

No. 14352

United States
Court of Appeals
For the Ninth Circuit.

SAM BLASSINGAME,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-24-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF COUNSEL

MAX KOSHER,

Attorney for Appellant,

2919 Wetmore Avenue.,
Everett, Washington.

CHARLES P. MORIARTY,
RICHARD D. HARRIS,

Attorneys for Appellee,

1012 U. S. Court House,
Seattle 4, Washington.

United States District Court, Western District of Washington, Northern Division

No. 48895

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM BLASSINGAME and PATRICIA LEWIS, Alias PAT LEWIS,

Defendants.

INDICTMENT

The Grand Jury charges:

Count I.

That on or about January 5, 1952, at or near Portland, Oregon, Sam Blassingame and Patricia Lewis, alias Pat Lewis, did conspire and agree together, and with each other, to commit an offense against the United States, that is, to knowingly and unlawfully, and in violation of Title 18, U.S.C., Section 2422, cause the said Patricia Lewis, alias Pat Lewis, to go in interstate commerce from Portland, Oregon, to Seattle, Washington, with the intent and purpose on the part of said Sam Blassingame and Patricia Lewis that the said Patricia Lewis should engage in the practice of prostitution and that said defendants did knowingly cause said Patricia Lewis to go and be carried as a passenger upon the line of a common carrier, to wit, United Airlines, in the said interstate commerce.

It was further a part of said conspiracy that the said Sam Blassingame should accompany the said Patricia Lewis across the state line from Oregon to Washington, as a passenger upon the line of said common carrier, to Seattle, Washington, and in order to effect the object of the said conspiracy, the said Sam Blassingame and Patricia Lewis did commit certain overt acts within the Northern Division of the Western District of Washington and within the jurisdiction of this court, to wit:

Overt Acts

1. That said Sam Blassingame and Patricia Lewis bought airplane tickets at Portland, Oregon, via United Airlines, to Seattle, Washington, on January 5, 1953.

2. That said Sam Blassingame and Patricia Lewis boarded United Airlines airplane, Flight No. 675, at Portland, Oregon, to Seattle, Washington, on January 5, 1953, at approximately 3:45 p.m.

3. That said Sam Blassingame and Patricia Lewis arrived at Seattle-Tacoma Airport, located in King County, in the Northern Division of the Western District of Washington, on January 5, 1953, at approximately 4:45 p.m., on board the United Airlines airplane, Flight No. 675.

4. That said Sam Blassingame and Patricia Lewis after arriving in King County as heretofore alleged in the preceding paragraph of this Indictment, traveled by the same taxicab from said air-

port to an address near Jackson Street, Seattle, Washington, on January 5, 1953.

5. That said Sam Blassingame on January 5, 1953, transported Patricia Lewis by private automobile from the address near Jackson Street, Seattle, Washington, to 3009½ E. Spruce, Seattle, Washington.

All in violation of Sections 2422 and 371, Title 18, U. S. C.

A True Bill.

/s/ WALLACE L. CAUSUES,
Foreman.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

[Endorsed]: Filed December 30, 1953.

[Title of District Court and Cause.]

MOTION FOR A JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE A MOTION FOR NEW TRIAL

Comes now the defendant, Sam Blassingame, through his attorney, Max Kosher, and moves this Court for a judgment of acquittal notwithstanding the verdict, upon the grounds that the evidence

introduced at the trial herein was not sufficient to sustain a verdict of guilty against the defendant, Sam Blassingame.

That in event a motion for judgment of acquittal is denied, and in that event, the defendant, Sam Blassingame, through his attorney, Max Kosher, hereby moves this Court for an order granting a new trial to the said defendant on the following grounds:

(1) That the verdict rendered herein was contrary to the interests of justice;

(2) For error of law occurring at trial and excepted to by said defendant; and

(3) That the verdict is contrary to law and evidence.

/s/ MAX KOSHER,
Attorney for Defendant, Sam Blassingame.

/s/ JOHN E. PRIM,
Attorney for Pat Lewis.

Receipt of copy acknowledged.

[Endorsed]: Filed January 29, 1954.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR ACQUITTAL AND FOR A NEW TRIAL

This matter having come for trial before the undersigned Judge of the above-entitled court on the 21st day of January, 1954, the plaintiff appearing by its counsel and defendant, Sam Blassingame appearing in person and with his attorney and the court having taken the motion for acquittal under advisement until the 15th day of February, 1954, and all parties having appeared upon that date and the court being fully advised herein, now therefore

Ordered, Adjudged and Decreed that the motion for judgment for acquittal of the defendant, Sam Blassingame notwithstanding the verdict of the jury be and the same is hereby denied, and it is further

Ordered, Adjudged and Decreed that the motion of the defendant, Sam Blassingame, for a new trial be and the same is hereby denied.

Done in Open Court This 15th Day of February, 1954.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

/s/ MAX KOSHER,
Attorney for the Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1954.

United States District Court, Western District of Washington, Northern Division

No. 48895

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM BLASSINGAME,

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 15th day of February, 1954, the attorney for the Government, and the defendant, appearing in person and being represented by Max Kosher, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given to the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof; that the Probation Officer of this district has made a pre-sentence investigation and report to the Court; now, therefore,

It Is Adjudged that the defendant has been convicted by jury verdict and is guilty and is convicted of the offense of violation of Sections 2422 and 371, Title 18, U.S.C., as charged in Count I of the Indictment, there being only one Count in the Indictment herein, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient

cause to the contrary being shown or appearing to the Court,

It is Ordered and Adjudged that on Count I the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in such institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Four (4) Years.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 15th day of February, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

(Vio. White Slave Traffic Act and Conspiracy to violate said Act.)

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Sam Blassingame, 157 15th St., Seattle, Washinton.

2. Max Kosher, Attorney for the defendant, 2919 Wetmore Avenue, Everett, Washington.

3. The offense, Title 18, U.S.C. Section 2422, (Conspiracy to Violate the Mann Act—conspiring to transport a woman in interstate commerce for the purpose of prostitution).

4. Judgment, Sentence and Commitment was entered on the 15th day of February, 1954, by the Hon. William J. Lindberg, Judge of the above-entitled court, adjudgment that the defendant Sam Blassingame had been convicted by a jury verdict and was guilty of the crime or offense of violation of Title 18, U.S.C., Section 2422; adjudging further that the defendant, Sam Blassingame, be committed to custody of the Attorney General of the United States for imprisonment in such institution as the Attorney General of the United States, or his authorized representative, may by law designate for a period of four years, and adjudging that further the Clerk of the above-entitled Court deliver a certified copy of the Judgment, Sentence and Commitment to the United States Marshal, or other qualified officer, and that the said certified copy serve as a commitment of the defendant.

5. That the defendant has not been confined, but has been admitted to bail.

The defendant, Sam Blassingame, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated Judgment.

Dated this 15th day of February, 1954.

/s/ MAX KOSHER,
Attorney for the Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause.]

ORDER

Good Cause Appearing,

It Is Hereby Ordered that the defendant, Sam Blassingame, be and he is hereby granted until May 15, 1954, in which to file the transcript in the above-entitled cause.

Done in Open Court this 26th day of February, 1954.

/s/ WILLIAM J. LINDBERG,
Judge of the Above-Entitled Court.

Presented by:

/s/ MAX KOSHER.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY

The Appellant will rely on the following points in this proceeding:

1. The District Court erred in denying the Motion of defendant, Sam Blassingame, for acquittal.

a. That the evidence was insufficient to take the case to the jury.

b. That the charge of conspiring to violate the Mann Act will not lie where one of two of the alleged conspirators is the alleged victim of the illegal transportation in interstate commerce for immoral purposes.

2. That the Court erred in admitting the testimony of Patsy Ruth McCandless, showing that she was induced to become a prostitute by the defendant, and that he accepted her earnings therefor.

/s/ MAX KOSHER,
Attorney for Defendant, Sam Blassingame.

Receipt of copy acknowledged.

[Endorsed]: Filed April 28, 1954.

In the District Court of the United States for the Western District of Washington, Northern Division

Number 48895

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM BLASSINGAME and MARY DONNA SONGAHID,

Defendants.

TRANSCRIPT OF TRIAL PROCEEDINGS

10:00 A.M., January 21, 1954

WILLIAM J. LINDBERG,
United States District Judge.

Appearances:

RICHARD D. HARRIS,
Assistant United States Attorney,

Appeared for and on Behalf of the Plaintiff;

MAX KOSHER,

Appeared for and on Behalf of the Defendant Blassingame;

JOHN E. PRIM,

Appeared for and on Behalf of the Defendant Songahid.

Proceedings

The Court: Is the Government ready?

Mr. Harris: The Government is ready.

The Court: Is the Defendant Blassingame ready?

Mr. Kosher: Yes.

Mr. Prim: The woman will be in in a moment, your Honor. She just went down the hall a moment.

The Court: Do you see any objection to having the prospective jurors take the box in the absence of the one Defendant.

Mr. Kosher: I have no objection.

Mr. Prim: I have no objection.

The Court: Mr. Harris?

Mr. Harris: I think it would have to be waived by the Defendant, your Honor.

The Court: I understand.

Mr. Prim: I waive it, your Honor.

The Court: I don't know if you can. I think we will fill the box, however, and ask her to waive it, and if she doesn't, we will ask them to step out again.

The Clerk: Mr. Lanning isn't here.

The Court: Oh.

The Clerk: Is Mr. Lanning going to be here?

Mr. Kosher: No, I don't think so. [3*]

The Court: Mr. Blassingame, when you were arraigned, Mr. Lanning represented you as your Counsel. Is he now representing you? He is not representing you now?

***Page numbering appearing at top of page or original Reporter's Transcript of Record.**

Defendant Blassingame: No.

The Court: Mr. Kosher, you are representing him?

Mr. Kosher: Yes.

(Whereupon, Defendant Songahid returned to the courtroom.)

The Court: The record will now show that Patricia Lewis and Sam Blassingame, both defendants, are now present in the courtroom, and the Clerk will call the Jury.

(Whereupon, a Petit Jury was duly empaneled and sworn, and an opening statement for and on behalf of the Plaintiff was made by Mr. Harris, and the following proceedings were had, to wit):

Mr. Prim: We have no statement at this time. We reserve it.

Mr. Kosher: The Defendant Blassingame reserves his statement until after the close of the Government's case.

Mr. Harris: Will your Honor excuse me just a moment? I would like, if possible at this time, because [4] of the inclement weather. I have not been able to talk to all of the witnesses, and might we take just a short recess at this time, a little sooner than usual?

The Court: Ladies and Gentlemen of the Jury: We will now take the mid-morning recess. The Court cautions you at this time that you are not, during the course of this case, to discuss among

yourselves, or to discuss with anyone any of the matters that may relate to the issues of this case, or any of the evidence that may be brought out until it is finally submitted to you for your verdict.

You are not to form or express any opinion as to the issues involved in this case, until it is finally submitted to you for your verdict.

You may now be excused, and the Court will remain in session while you leave.

(Whereupon, the Jury retired from the courtroom.)

The Court: The Court—Mr. Prim?

Mr. Prim: At this time, on behalf of Patricia Lewis, we move for a mis-trial because of the conduct of the Federal Prosecutor in mentioning that the arrest of this woman prior to her taking the stand.

The Court: I don't know, does the Government have any comment to make? [5]

Mr. Harris: I am not going to make any comment, your Honor, unless your Honor is inclined to rule.

The Court: I am not inclined to rule at this time. The Court will deny the motion and the record may show the Court denies the motion, at this time.

Mr. Prim: All right.

The Court: The Court will take a fifteen-minute recess.

(Whereupon, at 10:55 o'clock, a.m., January 21, 1954, a recess was had until 11:10 o'clock,

a.m., January 21, 1954, at which time, Counsel and Defendants heretofore noted being present, the following proceedings were had, to wit):

The Court: You may call the Jury.

(Whereupon, the Jury was returned to the courtroom.)

The Court: You may be seated.

It is stipulated that the Jury and the defendants are present in the courtroom?

Mr. Harris: Yes, your Honor.

The Court: Before you proceed, members of the Jury, the Court will instruct you, and at the conclusion of the case, that the opening statements of attorneys in the case are not evidence. They are merely a statement of what they think they may be able to prove and [6] they are not to be considered by you as evidence.

You may proceed, Mr. Harris.

Mr. Harris: Thank you, your Honor.

Mrs. Smith? [7]

BEULAH SMITH

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: I would like your name, and the spelling of your name.

The Witness: Beulah Smith.

The Clerk: B-e-u-l-a-h (spelling)?

The Witness: Yes.

The Clerk: S-m-i-t-h (spelling)?

(Testimony of Beulah Smith.)

The Witness: Yes.

The Clerk: Will you take the witness stand, please?

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. My name is Beulah Smith.

Q. And is that Miss or Mrs. Smith?

A. Well, I have been married. Mrs. Smith, I guess.

Q. And what is your address, Mrs. Smith?

A. 112 Seventh Avenue.

Q. And is that here in Seattle? A. Yes.

Q. And how long have you lived at that address?

A. Six or seven years. About six years. [8]

Q. Do you know Sam Blassingame?

A. Yes, I know Sam.

Q. Do you see him here in the courtroom?

A. Sure.

Q. Where do you see him?

A. Sitting there. (Indicating.)

Q. Sitting over there next to his Attorney?

A. Sure.

Q. Do you know Pat Lewis?

A. Yes, I know.

Q. And where is she? A. She sits——

Q. (Interposing): Where is she? Do you know her? A. Yes, I know her when I see her.

Q. And do you see her in the courtroom here today? A. No, I don't see Pat.

(Testimony of Beulah Smith.)

Q. Would you take a look and see now real carefully if you see her here in this courtroom?

A. No, if it is her. I never saw Pat dressed up, so that I wouldn't know her.

Q. You wouldn't know her?

A. Dressed up. Yes, there she is.

Q. Over here sitting next to Mr. Prim?

A. Yes, that is Pat.

Q. How long have you known Sam Blassingame?

A. Oh, three or four years; maybe longer.

Q. And how long have you known Pat Lewis?

A. Oh, about the last——

Mr. Prim: I am sorry; I didn't get the answer.

The Court: I don't think she finished the last answer.

A. (Continuing): Along about the last of 1952 when I met Pat.

Q. (By Mr. Harris): Where did you meet her?

A. She came up to my house with Sam.

Q. With Sam Blassingame? A. Yes.

Q. And do you know when it was in the latter part of 1952; what month it was?

A. No, I don't remember dates so well, but it was in 1952.

Q. All right, and why did she come to your house with Sam Blassingame?

A. Well, Sam always comes to my house. We were friends.

Q. I mean on this particular time when you first met her, why did she come there with him?

A. Well, he first come and asked would I have

(Testimony of Beulah Smith.)

anything needed done, and I told him "No," and when I [10] fix food, if I have anything done, if he wants something he eats, and if I don't have nothing, he gives me money to buy some.

Q. Did he do that on this occasion?

A. Once or twice, he gave me some money to buy food, and once or twice, I had some done.

Q. On this particular date, when Pat Lewis was with him, at that time, what happened?

A. Well, we just fixed some food, and we sat and played some records, and she left and he left.

Q. Did you see her again after that?

A. Yes, I saw her.

Q. When you saw her, would you—where would you see her, if you did, after that?

A. Well, she came to my house, once or two times after that, and I saw her walking down Jackson Street once or twice after that.

Q. When you saw her, was she by herself or with someone?

A. By herself when I saw her walking down Jackson Street.

Q. And when you saw her at your house, was she by herself, or with someone?

A. She came with Sam.

Q. Did you ever see her at your house at any time [11] other than with Sam? A. No.

Q. She was always with Sam when she came to your house? A. Yes.

Q. Now, did she ever tell you what she did for a living, Pat Lewis?

(Testimony of Beulah Smith.)

A. Well, she just says she is going out to make some money.

Q. Well, did she say how?

Mr. Kosher: Just a minute, if your Honor please. On behalf of the Defendant Sam Blassingame, I object to it as hearsay as to him, unless the statements were made in his presence.

The Court: You might lay further foundation, Mr. Harris.

Mr. Harris: Well, your Honor, I think probably that objection is well taken at this time.

However, the Government hopes to prove a conspiracy at a later time.

The Court: Well, I will advise the Jury at this time that any statement made here as to Pat Lewis will not be binding upon the Defendant Sam Blassingame unless there is something to show that he was present, or heard it. [12]

Mr. Prim: Just a moment, your Honor. I wonder if the Court will advise, or see that the Government—these transactions that she is now testifying to is somewhere close to the date or the time that is alleged in the indictment.

Now, as far as I can get it, your Honor, she said she knew this woman in 1952. She may have known her in 1951 and 1950, but that has nothing to do with this particular indictment.

The Court: I think that the Government should fix a time.

Q. (By Mr. Harris): Now, these times that

(Testimony of Beulah Smith.)

she came to your house that you mentioned, when was that?

What year, if you can say, and what month and what day, if you know?

A. Well, I don't remember dates, because I thought we were just friends, and I didn't think there was anything to keep dates about. I didn't think it was anything I would be hauled into Court on, and I don't remember dates. If I thought it was anything I should have kept up with, probably I would have.

Q. Well, what is your best recollection, what year was it? A. Well, it was in 1952. [13]

Q. And what part of 1952, if you know?

A. Along about the last of 1952 when I met Pat Lewis.

Q. Is that the best recollection you have?

A. Yes.

Q. All right. Now, did you have a conversation with her along about that time, concerning what she did, or did she tell you what she did?

A. Well, she——

Mr. Kosher: I will make the same objection I made heretofore, and further on the grounds that until a prima facie case of conspiracy is made, I think this testimony is irrelevant.

The Court: Objection overruled. The Court will advise the Jury, as before, that any statement made by this witness relating to conversation of the Defendant, Pat Lewis, or Mrs. Songahid, is not binding upon the Defendant Blassingame, unless it

(Testimony of Beulah Smith.)

should be connected up in some respect at a later time.

Mr. Harris: Upon the Defendant Blassingame.

The Court: Upon the Defendant Blassingame.

Mr. Harris: Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Harris): Now, what, if anything, did she say to you at that [14] time as to what she did?

A. Well, I don't know, the last time she was up at my house, we was supposed to go away some place, and I wanted to go with them. That is all I know.

Q. Well, did she ever tell you how she made her living?

A. Well, she just said she was going down the street and make some money; that is all.

Q. Did she ever say anything else as to how she made her money?

(Whereupon, there was a brief pause.)

The Court: Did you hear the question?

The Witness: Yes, I heard it, but I don't know how to answer it.

Q. (By Mr. Harris): Well, did she ever say anything else other than she was going down on the street and make some money as to how she earned her money?

A. No, she just says she was a prostitute, that is all.

(Testimony of Beulah Smith.)

The Court: She just said what?

The Witness: She just said she was going down and make some money. She was a prostitute. That is all I know. Pat said it.

Mr. Harris: I ask if the reporter got the [15] last answer?

The Court: Mr. Reporter, did you get the last answer?

The Reporter: Yes, your Honor.

Q. (By Mr. Harris): Did she at any time during the latter part of 1952 tell you she was going to go away, or go on a trip?

A. Yes. I wanted to go. Two or three of us was supposed to go. I wanted to go, but then Sam did tell me I couldn't go because there would be no colored people where they were going.

Mr. Kosher: I couldn't hear that.

Mr. Harris: I don't think it was responsive.

Mr. Kosher: I didn't hear the last part.

The Court: Do you wish it read?

Mr. Kosher: Yes, your Honor.

The Court: Mr. Reporter, read the last answer.

(Whereupon, preceding answer was read by the reporter.)

Mr. Kosher: I move that it be stricken upon the grounds it is not responsive.

The Court: The answer may be stricken.

Mr. Kosher: And will the Court instruct the Jury to disregard it?

The Court: The Court does instruct the Jury

(Testimony of Beulah Smith.)

to [16] disregard the last answer. The Court has stricken it from the record as not being responsive to the question.

Q. (By Mr. Harris): Mrs. Smith, did Pat Lewis say where she was going?

Mr. Prim: If your Honor please, that is repetitious. I believe she has answered several times she was going to Portland.

The Court: I don't believe the record is clear on that. Do you have in mind the last question? Did Pat Lewis ever tell you where she was going?

A. She said she was going to Portland. That is all I know.

Q. (By Mr. Harris): What, if anything, did you say to her after that or—yes, what, if anything, did you say to her when she told you she was going to Portland?

A. Well, we just talked as usual; nothing in particular.

Q. Well, did you—did you have—did you ask Sam Blassingame anything at that time?

A. Yes. I told you I asked him, and he said there would be no colored people where he was going.

Q. What did you ask him?

A. I wanted to go with him. [17]

Q. And what did he say?

A. He just said there wouldn't be any colored people where he was going, and I couldn't go.

Q. Did Pat Lewis tell you why she was going to Portland?

(Testimony of Beulah Smith.)

A. She just said she was going to make some money. That is all.

Q. Did Sam Blassingame tell you why he was going to Portland? A. No.

Q. Mrs. Smith, are you able to read or write the English language?

A. I read a little bit. Not too well.

Mr. Harris: Your witness.

Cross-Examination

By Mr. Kosher:

Q. Do you remember when you first met Pat Lewis? A. Yes.

Q. What year was that?

A. Along about the last of 1952.

Q. Do you remember what month it was?

A. No.

Q. Now, could it have been that you met her sometime in 1951?

A. It was in 1952, yes, I met her. [18]

Q. You are sure it was in 1952? A. Yes.

Q. How do you fix the date?

A. How do I fix the date?

Q. Yes; how do you know it was 1952 and not 1951?

A. Well, it was the year before last. What was that?

Q. You say it was the year before last?

A. Yes.

Q. And you are sure of that? A. Yes.

(Testimony of Beulah Smith.)

Q. And you say it was the latter part of the year before last, is that right? A. Yes.

Mr. Kosher: I think that is all.

Cross-Examination

By Mr. Prim:

Q. Mrs. Smith, what is your occupation now?

A. Well, I did work until I was sick. I had to go in the hospital a couple of times, and I haven't been working.

Q. What was your occupation?

A. Housework. I work for Mittelstadt.

Q. Pardon?

A. I work for Mittelstadt for five and one-half years, [19] for Mrs. Thompson.

Q. Where were you living at that particular time?

A. I used to live at Sixth Avenue North.

Q. At the time that you spoke of that you met Patricia Lewis, where were you living then?

A. 112 Seventh Avenue.

Q. Under what circumstances did you meet Patricia Lewis?

A. Under what circumstances? I don't think——

I was going with a man, and he was a friend of Sam's, and quite naturally, that would make Sam a friend of me, and we have been friends ever since I have known him, and he would always come around.

Q. Now, do you remember the first thing that Patricia did at the time that you met her?

(Testimony of Beulah Smith.)

A. She didn't do anything but come in the house and sit down.

Q. May I call your attention to this: Didn't she ask you to use the 'phone?

A. No. I think she first came to my house and she came in and sat down, and she came in and I asked her to sit down, and then she went up to the bathroom and I went with her and came downstairs, and Sam said, "Do you have anything in here to eat?" And I said, "No."

Q. Now, may I call your attention to this, [20] Mrs. Smith:

Wasn't it about the seventh day of January that Mrs. Smith—that Patricia Lewis came to your house, and she called me on the 'phone? Wasn't that the first time you ever met her?

A. I don't remember dates. I keep telling you I will not promise you a definite date, because I don't remember.

Q. Do you remember her using the 'phone and calling me?

A. I don't remember her using the 'phone and calling you, but she has been to my house and sat down and used the 'phone, and me and Sam would be talking or fixing something to eat for him or something.

Q. Have you ever been convicted of a crime, Mrs. Smith? A. Yes.

Q. What was it? A. Prostitution.

Q. And when?

A. Oh, a couple of years ago.

(Testimony of Beulah Smith.)

Q. Well, what year was it?

A. I don't know; two or three years ago. I don't know.

Q. 1952 or '53? [21]

A. It must have been fifty—it must have been in '50, I think.

Q. Why did you ask Sam Blassingame to go to Portland with him?

A. Well, I always go somewhere with him. We always ride around the street together, and we were friends, and I didn't think there was any harm if he was going off, if I could go with him.

Q. From Seattle to Portland? A. Yes.

Q. Were you practicing prostitution at that particular time?

A. No, I never practiced prostitution anywhere, just since I have been—after I got sick, I had two children, and I was on the Welfare, and anybody on the Welfare, they wouldn't get enough money to support their children, and I was drunk and I needed some, and I got some, and I paid a crime for it, and what I didn't do in time, I paid for it and I am not doing any time now, and I would rather you didn't ask me that.

Mr. Prim: No further questions.

Mr. Harris: Thank you, Mrs. Smith.

Mr. Kosher: That is all. I haven't any further questions.

The Court: That is all, Mrs. Smith. [22]

(Witness excused.)

Mr. Harris: May Mrs. Smith be excused, your Honor?

The Court: Any reason to hold Mrs. Smith?

Mr. Kosher: No.

The Court: All right, you may be excused.

Mr. Harris: Thank you. I would like to call Mr. Scott. [23]

LEE WILLIAM SCOTT

upon being called as a witness for and upon behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: I would like your name and the spelling of your name, please.

The Witness: Lee William Scott.

The Clerk: Lee, L-e-e (spelling) William Scott, S-c-o-t-t (spelling)?

The Witness: Yes, sir.

Direct Examination

By Mr. Harris:

Q. Mr. Scott, would you state your name again for the record? A. Lee William Scott.

Q. And what is your occupation, sir?

A. Police Officer, City of Seattle.

Q. And how long have you served in that capacity? A. Almost eighteen years.

Q. What is your rank, if any?

A. Sergeant.

Q. And what is your address?

(Testimony of Lee William Scott.)

A. 635 West 78th Street.

Q. Were you employed as a Police Officer by the City of Seattle on or about January 6, [24] 1953? A. Yes, sir; I was.

Q. At that time, did you have occasion to see the Defendant Pat Lewis? A. Yes, sir.

Q. What time of the day was it?

A. It was——

Q. (Interposing): That you first saw her?

A. Shortly after midnight.

Q. On January 6th?

A. On the 6th of January, 1953.

Q. And where was it?

A. It was at 3009½ East Spruce Street. That is a house with apartments upstairs, and this was the rear apartment.

Q. All right; at that time, where did you see her?

A. She was in the living room of that apartment at that address.

Q. Did you have a conversation with her at that time?

A. Yes, I had a conversation with Miss Lewis, and the soldier there in the living room of that address.

Q. And was there anyone else present?

A. Yes, there was also another—there was another soldier there plus a civilian that was also present in that room. [25]

Q. Was there any other officer with you at that time?

(Testimony of Lee William Scott.)

A. Yes, there was an officer by the name of Francis, E. L. Francis.

Q. All right; at that time then what, if anything, did Pat Lewis say to you?

Mr. Kosher: Just a minute now. I object to that on the grounds it is hearsay as to the defendant Blassingame.

Mr. Prim: Upon further grounds, your Honor. May I question this Defendant? I mean, this witness, for one moment?

I want to make a motion.

The Court: You mean on voir dire?

Mr. Prim: I want to question him as to the results of this—of this transaction that he had. I just want to ask him one or two questions.

The Court: Are the questions as to the circumstances of this conversation?

I don't know just what questions you have in mind. That may be, but only insofar as——

Mr. Prim (Interposing): It relates to this particular matter and surrounding the whole transaction of that particular night.

Mr. Harris: Your Honor, I am not anticipating what [26] Mr. Prim is going to do now, but I think it is rather irregular, especially with the Jury present, at this time to interrupt my examination.

The Court: Well, I agree with you other than as to the circumstances of the particular time, and place and who may be present.

Mr. Harris: No objection to that, your Honor.

Mr. Prim: May I ask that the Jury be excused,

(Testimony of Lee William Scott.)

and I will address the question to you and you will know exactly what it is.

The Court: No, I am going—no, I am not going to excuse the Jury at this time. The Court will deny any right to question other than on voir dire relating to the circumstances, time, place, and who was present at the conversation.

You may continue, Mr. Harris.

Mr. Harris: Well, if Mr.—were you allowing Mr. Prim to inquire as to that?

The Court: As to any matters that may relate as to who was present, as to the time and place.

Mr. Prim: No questions on that.

Q. (By Mr. Harris): Now, Mr. Scott, I will repeat my question: What, if anything, did she say to you at that time?

Mr. Kosher: I renew my objection, if your Honor [27] please. I don't think you ruled on that.

The Court: The objection made by the Defendant Blassingame will be denied with this statement to the Jury, that any statement made by the Defendant Lewis—the Defendant referred to as Lewis here, true name being Mary Donna Songahid, is not binding upon the Defendant Blassingame unless it is in some way connected later, so that at this time, any conversation related as to the Defendant Lewis may not be considered as to the Defendant Blassingame.

Mr. Harris: Thank you, your Honor.

Q. (By Mr. Harris): Mr. Scott?

A. The only thing that Pat Lewis said at the

(Testimony of Lee William Scott.)

time when we were questioning the group was that she was not guilty of doing what the soldier had said in her presence.

Q. Had—did the soldier make a statement in her presence? A. Yes.

Q. And within hearing of her?

A. Yes, in her presence.

Q. All right, what did he say?

Pardon me, excuse me, who was this? What was his name?

A. His name was Parks, last name was [28] Parks.

Q. Do you know what his first name was?

A. I, for the moment, I forget. I remember the last name.

Q. Would Thomas E. Parks help you to refresh your memory? A. Yes.

Q. What, if anything, did he say in her presence at the time?

A. He said that he had performed an act of intercourse with her, and he had paid her for it, and he didn't know where the money was that he had paid her.

Q. Did you ask Patricia, Pat Lewis, where the money was? A. Yes, I did.

Q. What did she say, if anything, to that?

A. She said she didn't have any money, and that she had not performed the act.

Q. Did the soldier say anything—Mr. Thomas E. Parks say anything else in her presence at that time?

(Testimony of Lee William Scott.)

A. Yes, he said she took something out of her brassiere and had gone over to the kitchen sink. That was through the living room into the kitchen and in to the sink on the left-hand side of the kitchen, and pulled the strainer aside and put something down there. [29]

Q. What did you do, if anything, after that?

A. I thought at that time it was the money that she had hid.

Q. All right; then, after that, did you leave 3009½ East Spruce Street?

A. Yes, I had looked down the sink and——

Q. (Interposing): I beg your pardon; did you leave? A. Yes.

Q. And where did you go?

A. I took her to Police Headquarters.

Q. Took who?

A. Pat Lewis and the two soldiers and the civilian to Police Headquarters.

Q. And where was that located?

A. At Third Avenue and James Street.

Q. In the City of Seattle? A. Yes.

Q. And what happened, if anything, after you arrived there?

A. I stopped at the captain's office on the way up to the city jail and told them what I had, and the reason I was off the air, and went up to the sixth floor of the building and proceeded to book Pat Lewis.

Q. What, if anything, is on the sixth floor?

A. The city jail.

(Testimony of Lee William Scott.)

Q. For the men or the women?

A. Both. [30]

Q. And where then did you take Pat Lewis in relation to the——

A. (Interposing): I took her up to the booking desk and proceeded to book her there.

Q. What, if anything, occurred there at that time?

A. Officer Francis was alongside of Pat Lewis, and I went inside the cage and was inside there alongside the booking officer that was booking Pat Lewis.

Q. Were you able to see her? A. Yes.

Q. How far away were you from her at that time?

A. Possibly two and one-half or three feet, just across the counter.

Q. I see. What, if anything, did she do at that time?

Mr. Kosher: If your Honor please, again on behalf of the Defendant Blassingame, I object to this on the grounds it is incompetent, irrelevant and immaterial as to what she did at this time.

The Court: Objection overruled. The Court again advises the Jury that this testimony relates to the Defendant Pat Lewis, and is not binding upon the Defendant Blassingame unless otherwise connected.

Mr. Kosher: Your Honor, so that I will not have to object all the time and interrupt Counsel, [31]

(Testimony of Lee William Scott.)

will your Honor instruct the Jury as to all of these matters and I will not have to object further and interrupt Counsel?

The Court: It may be understood that testimony which relates to one defendant relative to actions, conversations and so on, are not binding upon the other defendant unless and until such time as they may be connected up by some subsequent evidence, and that relates not only to the testimony given, but also to any testimony of a similar nature until such time as it may be connected in some way.

Q. (By Mr. Harris): What, if anything, did she do then, Sergeant, at that time?

A. I noticed Pat Lewis had something in her hand and tear something off. It seemed like a piece of paper, and dropped it alongside of her on the right side and I motioned to Francis, who was standing there, to see what it was, and he picked it up and gave it to me.

Q. And what, if anything, did you do with it at that time?

A. And I asked her where the tickets came from, or what she was doing, and she was non-commital. She wouldn't say anything about anything.

Q. After you picked it up, what were you able to [32] determine it was?

A. It was—she had torn off the name of two persons from an airplane ticket from Portland, Oregon, to Seattle.

Q. What names was it she tore off?

(Testimony of Lee William Scott.)

A. Mrs. Blassingame and Mr. Blassingame.

The Clerk: Plaintiff's Exhibits 1 and 2 marked for identification.

(Plaintiff's Exhibits Nos. 1 and 2 marked for identification.)

Q. (By Mr. Harris): I am handing you Plaintiff's Exhibit 1, I will ask you to state what that is, if you know?

A. Yes, this is the portion of the ticket that was torn off and retrieved by Officer Francis and me and given to me at that time.

Q. And how are you able to identify it?

A. Well, I put the date over here, and the time and my initials.

Q. All right.

A. On three portions of it. The two that were torn off, plus the original ticket.

Mr. Harris: All right, may the record show, your Honor, that Plaintiff's Exhibit 1 consists of one large sheet of paper and two smaller portions of paper? [33]

Q. (By Mr. Harris): And you say that your initials appear on both the two smaller portions of the paper?

A. Yes, sir; yes, sir, they do.

Q. All right, Sergeant Scott, I am handing you now what has been marked Plaintiff's Exhibit No. 2, and I will ask you to state what that is, if you know?

A. Yes, this is the other ticket, and portions

(Testimony of Lee William Scott.)

torn off of the ticket with the date, time and my initials on it.

Q. Now, that exhibit, then, is the—portion torn off relates to Mrs. or Mr.?

A. Mrs. Blassingame on this one.

Q. So that the other one, Plaintiff's Exhibit 1, would be "Mr.," is that correct?

A. Yes, sir, Mr.

Mr. Harris: May the record show, your Honor, that Plaintiff's Exhibit No. 2 consists of one large sheet of paper and two smaller portions?

The Court: The record may so show.

Mr. Harris: Your witness.

Cross-Examination

By Mr. Kosher:

Q. You say that you had a conversation with a soldier in the presence of this young lady sitting next [34] to me? A. Yes, sir.

Q. And that was in her apartment?

A. Yes, sir.

Q. How did you get in that apartment?

A. I rapped on the door and was admitted, by Miss Lewis.

Q. Now, as a matter of fact, didn't you break the door in? A. No, sir.

Q. Or did anybody in your presence break the door in? A. No, sir.

Q. And you subsequently filed a charge against this girl, didn't you, of practicing prostitution?

(Testimony of Lee William Scott.)

A. Yes.

Q. Those charges were dismissed, weren't they?

Mr. Harris: I will object to that, your Honor. I think it is immaterial to this case.

The Court: Objection overruled.

Q. (By Mr. Kosher): Isn't that a fact, Sergeant, the charges against her were dismissed?

A. Yes, sir.

Q. And wasn't it a fact that they were [35] dismissed because you had broken into her apartment, or at least the Court said you had broken into her apartment?

Mr. Harris: I object to that, your Honor.

The Court: Well, the question is whether he knows. He hasn't indicated he would know, so that at this point, the Court will sustain the objection.

Q. (By Mr. Kosher): Do you know, Sergeant?

A. Would you state it again, please?

Q. Do you know whether or not the charges were dismissed because the Court said that you had broken into her apartment?

A. That is not my recollection.

Q. Did you have a warrant at the time that you went to her apartment?

Mr. Harris: I think that is immaterial, your Honor.

The Court: Objection sustained.

Q. (By Mr. Kosher): Now, you took her then to the police station, is that right?

A. Yes, sir.

Q. And you didn't search her, did you?

(Testimony of Lee William Scott.)

A. No, sir.

Q. You were standing some feet away while she was being searched, isn't that right? [36]

A. No. The booking is done on one side. All searching of the women prisoners is done by a woman matron of the women prisoners on the other side of this same floor.

Q. You didn't search her yourself?

A. No, sir.

Q. And you didn't book her yourself, did you?

A. Yes.

Q. You did book her yourself? A. Yes.

Q. But you yourself did not pick up these pieces, did you? They were handed to you by someone else? A. That is correct.

Q. And you had no conversation with her with reference to where she got these tickets?

A. When the officer handed me the tickets across the counter, I asked Pat about them, and she wouldn't answer anything.

Q. She was under arrest at that time, wasn't she?

A. At that time, she was under arrest.

Q. And she said nothing? A. Correct.

Q. And you knew that was her right, didn't you?

Mr. Harris: I object to that, your Honor.

The Court: Objection sustained. [37]

Q. (By Mr. Kosher): Now, at that time, Sam Blassingame wasn't there, was he?

A. No, sir.

(Testimony of Lee William Scott.)

Q. And he wasn't at her apartment at the time that you went and arrested her, was he?

A. No, sir.

Q. And you didn't see him around there?

A. No, sir.

Q. And you didn't take these tickets from him?

A. No, sir.

Q. And he wasn't there when you got the tickets? A. No, sir.

Mr. Kosher: I think that is all, Sergeant.

Cross-Examination

By Mr. Prim:

Q. Sergeant Scott, you were present at the trial before the Honorable Judge Neergaard, isn't that right? A. Yes, sir.

Q. And you were there each and every time that we had a session concerning Patricia Lewis on this arrest matter?

Mr. Harris: I will object to that, your Honor. It goes beyond the scope of the direct examination.

The Court: What is the purpose, Mr. Prim? [38]

Mr. Prim: That it was an illegal arrest and that this case was thrown out by reason of the illegal arrest.

The Court: That isn't material in this issue at this time.

Mr. Harris: May the Court at this time instruct the Jury that the remarks of Counsel are not to be considered as evidence?

The Court: The Court stated before that open-

(Testimony of Lee William Scott.)

ing statements of counsel and, likewise, any statements of counsel during the trial are not evidence, and the Jury should disregard them unless they relate to a question to the witness to answer.

You may proceed.

Objection sustained.

Q. (By Mr. Prim): Sergeant, were you looking at Patricia Lewis at all times while she was up being booked?

A. Yes. At the time she was being booked, I was alongside the booking officer and talking with her back and forth.

Q. Who was searching her?

A. There was no one searching her. It was all men on that side.

Q. Isn't it a fact that you went into her pocket and [39] got these particular things out and didn't she take them away from you, and didn't she start tearing them; isn't that correct? A. No, sir.

Q. Isn't that a fact? A. No.

Mr. Prim: Just a moment.

(Whereupon, there was a brief pause.)

Mr. Prim: No further questions.

(Testimony of Lee William Scott.)

Redirect Examination

By Mr. Harris:

Q. I believe, Sergeant Scott, that Mr. Kosher asked you whether or not you charged her as a result of this arrest; do you recall that?

A. Mr. Kosher, is that the attorney over there?

Q. Yes.

A. Yes, we charged her.

Q. And your reply was for prostitution, is that right? A. Yes, sir.

Q. Any other charge? A. Yes, sir.

Q. What was that?

Mr. Kosher: Just a minute. I object to that on the grounds it is immaterial. [40]

The Court: Objection sustained.

Mr. Harris: Your Honor, respecting the ruling of the Court, may I make just one remark?

The Court: You may.

Mr. Harris: Counsel asked her, or asked this witness under what charges she was booked. I objected to the question, your Honor, and I was overruled, and the witness was allowed to answer, and the answer was prostitution. I think, in view of that, that I would be entitled to ask him what, if any, charges——

Mr. Kosher (Interposing): I don't think that was the question.

The Court: I think that perhaps——

(Testimony of Lee William Scott.)

Mr. Harris (Interposing): I will respect your Honor's ruling.

The Court: ——that might show. However, I believe that the fact that it was answered when the matter was allowed to be immaterial would not justify the Court in permitting further immaterial examination.

Mr. Harris: All right, your Honor. I have no further questions. Thank you.

Mr. Kosher: That is all.

Mr. Prim: That is all.

The Court: That is all. [41]

(Witness excused.)

Mr. Kosher: I wonder if Sergeant Scott could remain around a short time?

I think I will have to reserve the right to recall him in any event, your Honor.

The Court: In other words, you want him available to take the stand?

Mr. Kosher: Yes.

The Court: So, Mr. Scott, you may leave now, but if you will be available at two o'clock.

The Witness: Yes, sir.

Mr. Harris: I would like to call Officer Francis, your Honor. He is a very short witness.

The Court: All right. [42]

EDWARD L. FRANCIS

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: I want your name and the spelling of your name, sir.

The Witness: Edward L. Francis.

The Clerk: F-r-a-n-c-i-s (spelling)?

The Witness: Yes, sir. F-r-a-n-c-i-s (spelling).

Direct Examination

By Mr. Harris:

Q. Sergeant, I will ask you again to repeat your name for the record, please.

A. Edward L. Francis.

Q. And your occupation?

A. Seattle Police Department, patrolman.

Q. Patrolman? A. Yes, sir.

Q. How long have you been with the Seattle Police Department? A. Seven years.

Q. And what is your address, Mr. Francis?

A. 10317 Densmore.

Q. Were you acting as a police officer of the City of Seattle on or about January 6, 1953? [43]

A. Yes, sir.

Q. Were you at the booking office of the Seattle Police Department in the Public Safety Building on that day? A. Yes, sir.

Q. And at that time, did you have occasion to see Pat Lewis? A. Yes, sir.

Q. And were you with Officer Scott at that time?

(Testimony of Edward L. Francis.)

A. I was.

Q. And were you there at the booking desk?

A. I was there.

Q. Now, where were you standing?

A. I was standing right behind Miss Lewis.

Q. Was there a shelf or a desk or anything in between you? A. No, sir.

Q. How far away were you from her at that time?

A. Oh, about two and one-half or three feet, right directly in back of her.

Q. All right, was anyone in between you and Pat Lewis? A. No, sir; nobody.

Q. Anything obstruct your view of her?

A. Nothing. [44]

Q. Was the light good there?

A. Very good.

Q. Where was Officer Scott, or Sergeant Scott?

A. He went around behind the desk with the Clerk. He was right across the desk from the defendant.

Q. All right, what, if anything, did Pat Lewis do at that time?

Mr. Kosher: Just a minute. On behalf of the defendant Sam Blassingame and as to this witness, I object on the grounds it is immaterial and hearsay as to him.

The Court: At this time, the particular conversation is not binding upon the Defendant Blassingame.

Q. (By Mr. Harris): All right.

(Testimony of Edward L. Francis.)

A. What was it?

Q. What did she do? What did you see her do?

A. Yes, sir; she took a little envelope out of her pocket, or a ticket, and started to tear it, and she dropped it on the floor, and the Sergeant nodded to me, and it was very obvious, and I picked it up and handed it to the Sergeant.

Q. Did you see her drop it? A. Yes, sir.

Q. And did you subsequently pick it up? [45]

A. Yes, sir.

Q. And was there anything else on the floor?

A. Nothing.

Q. And these were the only objects you saw her drop, is that right? A. Yes, sir.

Q. All right.

Mr. Harris: May I see that exhibit?

Q. (By Mr. Harris): Officer Francis, I am handing you Plaintiff's Exhibit No. 1 for identification. A. Yes, sir.

Q. And I will ask you whether or not that is the object you saw her drop? A. Yes, sir.

Q. And did you pick it up at that time?

A. Yes, I did.

Q. And to whom did you give it?

A. Sergeant Scott.

Q. All right; I am handing you Plaintiff's Exhibit No. 2 for identification, and I will ask you to state what that is, if you know?

A. Yes, sir.

Q. What is that?

A. This is the other one that she dropped. [46]

(Testimony of Edward L. Francis.)

Q. And what did you do with that?

A. I handed this directly to Sergeant Scott also.

Mr. Harris: All right. At this time, your Honor, the Government moves for admission into evidence of Plaintiff's Exhibits 1 and 2.

Mr. Kosher: On behalf of the Defendant Sam Blassingame, I object to them on the grounds they are incompetent, irrelevant and immaterial, and there is no connection shown between these exhibits and the Defendant Sam Blassingame.

The Court: Does the Government make a representation that these are matters to be connected up?

Mr. Harris: Yes, your Honor.

Further, I would like to examine this witness, and if your Honor wishes, I might reserve that again. The only thing, I don't want to recall Officer Francis if there was some other technicality.

The Court: Well, the Court would, upon objection, overrule the objection on the representation of the Government that they will be connected up. Of course, if they are not so connected up, the Court will consider a motion to strike.

Mr. Harris: Thank you, your Honor.

The Court: The Court will admit them upon that condition. [47]

(Plaintiff's Exhibits Nos. 1 and 2 admitted in evidence.)

Mr. Harris: No other questions of this witness.

(Testimony of Edward L. Francis.)

Cross-Examination

By Mr. Kosher:

Q. Mr. Francis, did you examine those two exhibits quite carefully when counsel handed them to you? A. Yes, sir.

Q. Are they the same now as you handed them to Officer Scott? A. Yes, sir.

Q. No changes at all?

A. Well, Officer Scott initialled them, at the time in my presence he initialled them, to put them in evidence.

Q. And two little pieces, they are torn out?

A. Yes, sir.

Q. You picked those up and handed those to him? A. Yes, sir.

Q. And aside from the markings on them that the Sergeant made there is no difference in these exhibits now and the time when you picked them up, is that right? A. That is right.

Q. You didn't see the Defendant Sam Blassingame at the time that you picked up these tickets, did you? [48] A. No, sir.

Q. And he wasn't present there in the jail?

A. No.

Q. Were you out at the apartment with Sergeant Scott? A. Yes, sir; I was.

Q. At the time you were out at the apartment, you didn't see Sam Blassingame, did you?

A. No, sir.

Mr. Kosher: I think that is all.

(Testimony of Edward L. Francis.)

Cross-Examination

By Mr. Prim:

Q. Officer, do you know where these exhibits were between the time that they are alleged to have been taken from Patricia Lewis up to today?

A. You mean——

Q. (Interposing): Have you had them in your presence?

A. No, sir; Sergeant Scott placed them in evidence.

Q. In evidence? A. Yes, sir.

Q. Were you there when he did that?

A. Yes, sir.

Q. Do you know whether or not they have been taken out of evidence between that time and this time? A. That I don't, sir. [49]

Q. When were they taken out of evidence, do you know?

A. Well, I imagine they were taken——

Q. (Interposing): Not what you imagine. Do you know? A. I don't know, sir.

Q. You don't know? A. No, no.

Mr. Prim: No questions.

Mr. Harris: That is all. May Officer Francis be excused, your Honor?

The Court: If there is no objection.

Mr. Kosher: I have no objection; or he can stay, if he wants to.

The Court: Mr. Prim, do you think you will recall him?

(Testimony of Edward L. Francis.)

Mr. Prim; No.

The Court: You may be excused, then, Mr. Francis, and you need not return.

(Witness excused.)

The Court: We will now take the noon-day recess. Ladies and gentlemen of the Jury:

The Court will advise you again or admonish you that you are not to confer among yourselves or with anyone on the outside regarding any matters relating to the [50] issues of this case, and you are not to form an opinion in regard to any issues involved until the case is finally submitted to you for your verdict.

You may now be excused, and the Court will remain in session while you leave, and you should be back about 1:45 so that we can begin promptly at 2:00.

(Whereupon, the Jury retired from the courtroom.)

The Court: Mr. Harris, do you have any idea of how much more time the Government will take?

Mr. Harris: If your Honor please, just bear with me a moment.

(Whereupon, there was a brief pause.)

Mr. Harris: I think I have about two hours of further direct examination.

The Court: Then we won't finish up.

Mr. Harris: In all probability, we will not finish today.

The Court: All right. The Court will recess until 2:00 o'clock.

(Whereupon, at 12:05 o'clock p.m. January 21, 1954, a recess was had until 1:58 o'clock p.m., January 21, 1954, at which time, Counsel and Defendants heretofore noted being present, the following proceedings were had, to wit): [51]

(Whereupon, the Jury was returned to the courtroom.)

The Court: You may proceed, Mr. Harris.

Mr. Harris: May we have the usual stipulation, your Honor?

The Court: It is stipulated that the Jury and both Defendants are present?

Mr. Harris: Yes, your Honor.

The Court: Mr. Prim?

Mr. Prim: Yes, sir.

Mr. Harris: Mr. Caughey. [52]

ROBERT A. CAUGHEY

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: I want your name and the spelling of your name.

The Witness: Robert A. Caughey, C-a-u-g-h-e-y (spelling).

Direct Examination

By Mr. Harris:

Q. Sir, may I ask you for the record, the pronunciation of your name now? A. Caughey.

Q. Mr. Caughey, for the record, would you state your name, please?

A. Robert A. Caughey.

Q. And what is your address?

A. 1333 Northeast 47th Avenue, Portland, Oregon.

Q. And what is your occupation?

A. Passenger Agent, United Air Lines.

Q. And where are you employed?

A. Employed at Portland, at Portland International Airport.

Q. And how long have you been so employed?

A. Over six and one-half years. [53]

Q. And what are some of your duties as Passenger Agent?

A. Selling tickets, making reservations, checking baggage, passenger relations in general.

Q. And just what does United Air Lines do?

(Testimony of Robert A. Caughey)

A. They carry passengers, mail, express and freight, interstate and intrastate commerce.

Q. Are they a common carrier?

A. Yes, they are.

Q. And do they operate an air line between Portland and Seattle? A. Yes, they do.

Q. Did they operate one on January 5th, 1953?

A. Yes, they did.

Q. Were you working on that—on January 5, 1953, as a passenger agent for United Air Lines?

A. Yes, I was.

Q. And at Portland? A. Yes.

Q. At that time did you—did United Air Lines have a flight that was leaving Portland for Seattle?

A. Yes.

Q. What—do you remember what time of the day it was, or do they have more than one?

A. Well, there are numerous flights. There [54] was approximately fifteen a day between Portland and Seattle.

Q. Sir, I am handing you Plaintiff's Exhibits 1 and 2, and I will ask you to state, if you know,—if you have ever seen those before?

A. Yes, I have.

Mr. Prim: If it please the Court, I wonder if you would ask the witness to speak louder? It is difficult.

The Court: Yes, Mr. Caughey, if you would speak up so that Counsel at Defendants' table may all hear. It is necessary that they all hear all the testimony.

(Testimony of Robert A. Caughey)

Mr. Harris: Did you get the last answer?

The Court: You stated you had seen Exhibits 1 and 2 before?

The Witness: Yes, I have.

Q. (By Mr. Harris): And where?

A. I saw them when I issued them at Portland on January 5.

Q. Of what year? A. 1953.

Q. And to whom did you issue them?

A. They were issued to Mr. and Mrs. Blassingame.

Q. And who, if anyone, purchases them from you?

A. Mrs. Blassingame was the one who purchased the [55] tickets.

Q. Was she alone at that time, or with someone?

A. There was a man with her.

Q. And do you see that man here in the courtroom today? A. Yes, I do.

Q. Can you point him out, please?

A. Yes, he is sitting at the end of the table there.

Q. At the end of the table? A. Yes.

Q. And the woman that was with him, Mrs. Blassingame, are you able to identify her?

A. I couldn't identify her positively, no.

Q. Are you able to describe her?

A. She was a white woman, dark blonde, I would say.

Q. All right. Now, in reference to Plaintiff's Exhibits 1 and 2, what is their purpose, or what do they stand for?

(Testimony of Robert A. Caughey)

A. Well, these are the passengers' coupons from Air Line tickets. The flight coupon has been removed from the ticket. This is the passenger's coupon, and the passenger can keep it for his own records.

Q. And the other coupon that is removed is kept by whom? [56]

A. Kept by United Air Lines.

Q. Who writes the name Mr. and Mrs. Blassingame on these tickets?

A. At the time those were issued, the issuing agent wrote the names on them.

Q. Do you know for what flight these tickets were issued? What the number of the flight was?

A. Those tickets were issued for flight No. 675. However, the reservation at the time the tickets were issued was not confirmed.

Q. What time does the flight leave from Portland?

A. That flight at that time left at 3:45 in the afternoon.

Q. And how long a trip is it from Portland to Seattle?

A. Forty-five or fifty minutes. Scheduled fifty minutes on the schedule.

Mr. Harris: Thank you. Your witness.

(Testimony of Robert A. Caughey)

Cross-Examination

By Mr. Kosher:

Q. What time did you sell these tickets, do you remember?

Mr. Harris: Excuse me. May I ask another question?

The Court: Do you withdraw your question?

Mr. Kosher: Yes. [57]

Further Direct Examination

By Mr. Harris:

Q. And where in Seattle does that flight land?

A. That lands at the Seattle and Tacoma Airport.

Mr. Harris: Thank you.

Cross-Examination
(Continued)

By Mr. Kosher:

Q. What time did you sell those tickets?

A. It was fairly early in the afternoon.

Q. Well, about what time?

A. I would say 1:30 or 2:00 o'clock.

Q. How do you fix the time?

A. Well, if I remember correctly, and I believe I do, I was working the day shift at that time and I would have been off duty at 3:45.

Q. And the flight left at what time, did you say?

(Testimony of Robert A. Caughey)

A. 3:45 is the scheduled departure time of the flight.

Q. Did you go home before the flight left?

A. No, it usually takes—well, it always takes at least fifteen to twenty minutes for a ticket agent to check out and get his books balanced out, and oftentimes longer.

Q. And your best recollection is that you sold these tickets between 1:00 and 2:00 o'clock in the afternoon? A. That is right. [58]

Q. Now, did you sell a lot of tickets that day?

A. I can't say definitely we sold a lot. Some days are heavier than others. When we are ticketing, we normally sell quite a number of tickets.

Q. You say you are able to identify this gentleman next to me as one of the men at the ticket office?

A. Yes.

Q. But you are not able to identify the woman? Is that correct? A. That is correct.

Q. Do you see the little lady back there in the audience? Will you take a good look at her?

A. Which one are you referring to?

Q. The girl in the white coat.

A. I see her, yes.

Q. Do you recognize her as anybody that may have been in late that day? A. No, I don't.

Q. Could she have been there, so far as you know?

A. She could have been there, however, not with Mr. and Mrs. Blassingame.

(Testimony of Robert A. Caughey)

Q. You got a good look at these people, didn't you?

A. I got a good look at them, yes. I remember Mr. Blassingame more than Mrs.

Q. Now, as a matter of fact, you say that [59] Mrs. Blassingame purchased the tickets; is that right? A. Yes.

Q. Are you positive of that? A. Yes.

Q. Did she sign anything at that time?

A. No.

Q. And who paid you for the tickets?

A. Mrs. Blassingame gave me the money.

Q. Are you sure of that, also? A. Yes.

Q. Now, you don't see anybody in this courtroom right now that you can identify as the lady that told you she was Mrs. Blassingame, can you?

A. No one I can identify positively, no.

Mr. Kosher: That is all.

Cross-Examination

By Mr. Prim:

Q. Where——

Mr. Kosher: Excuse me.

Q. (By Mr. Kosher): You don't know whether the people who bought these tickets actually got aboard the plane, do you?

Let me ask you this: Did you see them get aboard the plane?

A. No, I did not see them get aboard the [60] plane.

(Testimony of Robert A. Caughey)

Mr. Kosher: I think that is all.

Q. (By Mr. Prim): Where is the ticket window with respect to the flight where the planes take off?

A. The ticket window is near the window, or the gate where the flights are loaded.

Q. Can you see the people there at all?

A. We can see the people when we are at the ticket counter, yes.

Q. Did you move from the ticket counter?

A. We always go into a back office that we have to check our cash out.

Q. I believe that you stated that you couldn't of your own personal knowledge—you don't know whether the people who purchased those tickets used them?

A. On that, I cannot answer positively, no.

Mr. Prim: That is all.

Mr. Harris: That is all, Mr. Caughey.

May Mr. Caughey be excused, your Honor?

Mr. Kosher: I don't care to have him remain.

The Court: Mr. Caughey, you may be excused.

Mr. Harris: Thank you.

(Witness excused.)

Mr. Harris: Patsy McCandless. [61]

PATSY RUTH McCANDLESS

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: I want your name and the spelling of your name, please.

The Witness: Patsy Ruth McCandless.

The Clerk: Patsy, P-a-t-s-y? (Spelling.)

The Witness: Ruth.

The Clerk: R-u-t-h? (Spelling.)

The Witness: McCandless, M-c-C-a-n-d-l-e-s-s. (Spelling.)

Direct Examination

By Mr. Harris:

Q. Would you state your name now again for the record, please?

A. My name is Patsy Ruth McCandless.

The Court: A little louder, please.

The Witness: My name is Patsy Ruth McCandless.

Q. (By Mr. Harris): Is that Miss or Mrs?

A. Mrs.

Q. And where do you reside, Mrs. McCandless?

A. I beg your pardon?

Q. Where do you live? [62]

A. 1317½ Yesler.

Q. That is here in Seattle, is it? A. Yes.

Q. How old are you? A. I am 21.

Q. Pardon? A. 21.

Q. When were you born?

A. December 14, 1932.

(Testimony of Patsy Ruth McCandless.)

Q. And where?

A. Shreveport, Louisiana.

Q. How long have you been in Seattle?

A. I have been in Seattle three years.

Q. How long? A. Three years.

Q. Three years? A. Yes.

Q. Do you know the Defendant, Sam Blassingame? A. Yes, I do.

Q. Do you see him here in the courtroom today?

A. Yes.

Q. Can you point him out?

A. Yes, that is him, right there (indicating).

Q. Pardon?

A. That is him right there on the corner there (indicating). [63]

Q. On the far corner? A. Yes.

Q. And do you know Pat Lewis?

A. Yes, I do.

Q. Do you see her here today? A. Yes.

Q. Where is she?

A. She is sitting right there, in the white dress.

Q. All right; now, when did you first meet Sam Blassingame?

A. Well, it was in January, when I first met him at a friend of mine's by the name of Beulah Smith.

Q. January of what year?

A. The latter part of 1952.

Q. You met her in the last part of 1952?

A. Yes, it was—yes, it was '53, or the first part of '53.

(Testimony of Patsy Ruth McCandless.)

Q. When was it you first met Sam Blassingame? —if you ever did?

A. I just told you when I first met him.

Q. You told me the last part of 1952, January; that doesn't make sense.

A. In 1953, the first part.

Q. When, in 1953? [64]

A. In January.

Q. What part of January?

A. I don't know the exact date.

Q. And was it the first part, or the last part?

A. All I know, it was in January.

Now, whether it was the last part or the first part, I do not know.

Q. All right; and where was it?

A. At Beulah Smith's house.

Q. And where is her house located, or where was it at that time?

A. Her house is located on Yesler, on the corner of Seventh and Yesler.

Q. Here in Seattle? A. Yes, it is.

Q. When you first saw Sam Blassingame, was he alone or with someone?

A. No, he was with Pat.

Q. Pat who? A. Pat Lewis.

Q. Pat Lewis? A. Pat Lewis.

Q. Where was she?

A. She was with Sam at Beulah Smith's house.

Mr. Kosher: I am very sorry; I can't hear [65] this witness.

(Testimony of Patsy Ruth McCandless.)

The Court: You will have to speak up a little bit.

Mr. Kosher: Could I sit on the other side?

The Court: If you wish. Keep your voice up so that the jury and the Defendants and the attorneys may all hear.

Q. (By Mr. Harris): At that time, did you have a conversation with Sam Blassingame?

A. Yes, I did.

Q. What was that conversation?

A. Well, he asked me about being his old lady.

Mr. Prim: If it please the Court, may I have a running objection to things she may testify as to what Sam Blassingame said to her not in the presence of my client, that it doesn't apply to my client?

The Court: The record isn't clear as to who may have been present. However, any testimony as to conversations—statements—made by the—allegedly made by the Defendant Lewis, or the Defendant Blassingame, would not necessarily be binding upon the Defendant Lewis until such time as there may be sufficient evidence to establish a conspiracy.

Mr. Kosher: I object to this question on the ground [66] it isn't responsive. I think the question was, did you have a conversation, and she attempted to relate what it was. The question should have been answered "yes" or "no."

The Court: Well, you might,—to clarify the record, you might—ask that question over again, Mr. Harris.

Q. (By Mr. Harris): Mrs. McCandless, did you

(Testimony of Patsy Ruth McCandless.)

have a conversation with the—with Sam Blassingame at that time? A. Yes, I did.

Q. What did—who was—was Pat Lewis present then? A. No, she had gone out.

Q. All right; and what did he say?

A. What did he say to me at that time?

Q. Yes.

A. Why, just that, what he said. He asked me to be his old lady.

Mr. Kosher: Just a minute. I object to that on the grounds it is immaterial and has no connection to this case, and I move it be stricken, and the jury instructed to disregard it. It couldn't tend to prove or disprove any issue in this case.

The Court: It would seem to be immaterial [67] at this time, Mr. Harris, unless it is connected up—this particular conversation, or that particular statement.

Mr. Harris: I would say this, that the purpose of this testimony is to go to the intent of the Defendant Blassingame, and I think that his conversation—that it is close enough in point of time, to be material as to that issue.

The Court: Well, if that is in the conversation had, I don't believe it is. I will reserve ruling on the matter, and may strike it. You call it to the Court's attention later, Mr. Kosher.

Mr. Kosher: All right.

The Court: At this time, the Court will reserve ruling, but will act on it, depending upon what the subsequent testimony may be.

(Testimony of Patsy Ruth McCandless.)

Mr. Harris: Thank you, your Honor.

Q. (By Mr. Harris): And, by asking you to be his "old lady," was that explained, or what was that?

Mr. Kosher: The same objection on the grounds it is immaterial, and tends to prove a commission of a separate and distinct offense not in any way related to the offense charged.

The Court: I am inclined to sustain the objection, Mr. Harris. [68]

Mr. Harris: Your Honor, I would like to request that Counsel, if he desires to have a running objection to all this, be allowed that until I am able, if I am able, to link it up and show its materiality, and I think that it does go basically to the intent of the defendant, and that the conversation that this witness had with the defendant as related to this particular charge in the Indictment is closely enough connected in point of time as to be material as to that element of the crime, if your Honor pleases.

Mr. Kosher: If your Honor pleases, this proffered testimony is of a highly inflammable nature and if he is going to make any offer of proof, I think it should be done outside of the presence of the jury.

The Court: All right, we will excuse the jury.

Ladies and Gentlemen of the Jury:

The Court will take a short recess at this time. I call your attention to the admonition given you on other occasions of a recess, and ask you to heed it at this time.

(Testimony of Patsy Ruth McCandless.)

The Court will call you back as soon as we dispose of this legal issue.

(Whereupon, the jury retired from the courtroom.)

The Court: All right, Mr. Harris, if you will make your offer. [69]

Mr. Harris: Let me just remind the Court that this is the position of the Government at this time under the authority of the cases shown in this District and decided by the United States Supreme Court; similar or like instances may be shown as only to go to the intent of the individual involved. That is the basic reason for this particular testimony. But, it also contains certain portions which I think go to the actual offense itself—the conspiracy.

Now, it is the intention of the Government to prove by and through this witness that at a time, and it will later be established about ten days or about a few days, a little over a week after the arrival of the Defendants Lewis and Blassingame in the City of Seattle, this defendant went to work in a house of prostitution located at 724 22nd Avenue South, in the City of Seattle with the Defendant Pat Lewis.

The Court: You mean this witness?

Mr. Harris: This witness here. That the Defendant Blassingame made arrangements for the rental of that house, and, in fact, did rent it under

(Testimony of Patsy Ruth McCandless.)

an assumed name, and paid the rent for it, and collected the money, not only from this witness, but from Pat Lewis, that was earned there through acts of prostitution, and this continued for approximately one month after the rental [70] of this house located there.

That this witness——

The Court : Can this witness testify to these matters?

Mr. Harris: Yes, that this witness performed acts of prostitution averaging seven or eight in the evening, averaging ten dollars, and that the price was set by——

The Court (Interposing): I think there is sufficient showing. It was entirely unrelated.

Mr. Harris: At the time it was, yes, your Honor, but it was preliminary as to her introduction to the Defendant Blassingame.

Mr. Kosher: May I, for the record, object to it on the grounds it tends to prove a separate and distinct crime and it wouldn't have any bearing on the question of whether or not he and she conspired together to leave Portland for the purpose of this lady engaging in prostitution — the fact that another one at another time engaged in prostitution.

I can see where it might be material for her to testify that she knew this girl practiced prostitution, but for him to show that he induced this girl to practice prostitution and get some of the earnings for it, is a separate and distinct crime, in no way related to this case, and the very purpose is to in-

(Testimony of Patsy Ruth McCandless.)
flame the jury against [71] this man, and to let them know he is a procurer and pimp and that he lived off the earnings of prostitutes and I think the Court has discretion in this matter and I think this testimony should be sifted out, and only things bearing on him leaving Portland with this woman, and her engaging in practicing prostitution should be in; but, for this girl to be reciting about her practicing prostitution and going to this house has no bearing on him leaving Portland and this girl.

The Court: It may be, Mr. Kosher, at the conclusion of the testimony or further along testimony admitted such as this would be subject to being stricken if the testimony of this witness and other testimony does not establish its relevancy, or its admissibility or probative value. But, that would not prevent it from going in at this time, and that will be the ruling of the Court.

Mr. Prim: The only thing I had in mind, your Honor, I wonder if the case Mr. Harris has is not similar—that is, if he had an understanding with this girl to go from Portland to some other place, or from Seattle to Portland, performing a conspiracy, or something of that nature. It would seem that that would be of probative value, but the way it is now, the crime which he is stating that she committed, is not a crime against the United States. [72]

It is a crime against the City or State of Washington, but not the United States at all, your Honor.

The Court: I take it the issue presented here further goes to intent.

(Testimony of Patsy Ruth McCandless.)

Mr. Harris: That is right.

The Court: As to the conspiracy.

Mr. Harris: That is right.

The Court: I mean for the formulating of a conspiracy; is that not it?

Mr. Harris: Yes, your Honor.

The Court: All right. You will call the jury.

(Whereupon, the jury was returned to the courtroom.)

The Court: You may be seated.

It is stipulated that the jury and the defendants are present in the courtroom?

Mr. Harris: Yes, your Honor.

The Court: Mr. Prim and Mr. Kosher, you so state?

Mr. Kosher: Yes.

Mr. Prim: Yes.

The Court: You may proceed.

Q. (By Mr. Harris): Now, Mrs. McCandless, you said, I believe, that Mr. Blassingame, Sam Blassingame, asked you to be his old lady? [73]

A. That is right.

Q. Do you know what he meant by that?

Mr. Kosher: I object to that on the grounds it is immaterial.

The Court: Objection sustained.

Q. (By Mr. Harris): Did Sam Blassingame ask you anything else at that time? A. Yes.

Q. What did he ask you?

A. He talked to me about the house, you know,

(Testimony of Patsy Ruth McCandless.)
going to this house of prostitution, so I told him I wouldn't know, I would have to make my mind up.

Q. What did he say then?

A. He said——

Mr. Kosher: I object to that on the grounds it is immaterial.

The Witness: Shall I finish my answer?

Mr. Harris: No, you will have to wait.

The Court: Objection overruled.

Mr. Harris: Yes, now you may finish.

The Court: I am going to advise the jury at this time:

Members of the Jury:

The crime charged here is conspiracy. The [74] fact that there may be evidence that will relate to other matters which may be a crime under some other state law, or otherwise, is not to be considered by you as evidence of commission of a crime here charged.

The fact that there may be another crime or possibly another crime, or a violation of the state law, is to be distinguished from the crime alleged in this case.

You may proceed.

Q. (By Mr. Harris): What else did he say then, if anything?

A. So, I said, "Let me think it over." So he said, "O.K."

Q. And did you then see him later after that?

A. Yes, I did.

Q. How much later?

(Testimony of Patsy Ruth McCandless.)

A. About three days after that.

Q. About three days?

A. Yes, that I seen him.

Q. And where did you see him then?

A. He came to Beulah's house to tell me—to find out what I had said and I said, "Yes."

Q. And what did you do, if anything?

A. Then he told me to get my clothes from Beulah's. [75]

Q. And did you?

A. Yes, I got my clothes, and packed them, and everything.

Q. Pardon?

A. I got my clothes and packed them.

Q. Keep your voice up.

A. I got my clothes and I packed them.

Q. All right, then what happened?

A. Then I moved from Beulah's. He moved me in his car.

Q. Who did? A. Sam Blassingame.

Mr. Kosher: I object to that on the grounds it is immaterial and tends to prove a separate and distinct offense in no way connected with the offense here charged.

The Court: Objection overruled.

Q. (By Mr. Harris): Who—in whose car did you move? A. In Sam Blassingame's car.

Q. And was he with you at that time?

A. Yes, he was.

Q. And where did you go, if any place?

(Testimony of Patsy Ruth McCandless.)

A. I moved—he move me to 724 22nd Avenue South.

Q. Were you with Mr. Blassingame when he rented that house? [76]

A. Yes, I was.

Q. Where—what were the circumstances around that?

A. Well, when he went to rent the house, the real estate man wasn't there, and he talked to the lady downstairs, and she told him either he could get in touch with the real estate man, so he came back and got in the car and went to the real estate office.

Q. You and Sam Blassingame? A. Yes.

Q. In whose car?

A. In his car, Sam Blassingame's car.

Q. What happened then?

A. We picked the real estate man up and came back to this house, 724 22nd Avenue South, and Sam Blassingame rented the house under a false name.

Q. How do you know that he rented the house under a false name?

A. Because I was right there.

Q. Do you know what name he used?

Mr. Kosher: Just a minute. I object to that on the grounds it is immaterial.

The Court: Objection sustained.

Mr. Kosher: I ask the Court to instruct the Jury.

The Court: And the Jury will disregard the

(Testimony of Patsy Ruth McCandless.)

answer to the last question, that is, relative to the false name. [77]

Mr. Harris: May I ask this question, still conscious of your Honor's ruling?

The Court: You may put it.

Q. (By Mr. Harris): Under what name did Sam Blassingame rent this house?

A. Robert Morse.

Mr. Kosher: Same objection.

The Court: Objection sustained. I don't think it is material, if it was a name other than his own. He rented the house, whether in his name or otherwise, is not material.

Mr. Harris: All right, your Honor.

Q. (By Mr. Harris): Now, did you stay at 724 22nd Avenue South? A. Yes, I did.

Q. And was that located in the City of Seattle?

A. It certainly was.

Q. And who else, if anyone, stayed there with you?

A. Well, Pat Lewis stayed there, and also Sam Blassingame.

Q. All right; now, what, if anything, did Sam Blassingame tell you while you were there at the house?

A. Well, he told me—he was talking to me about how—how to—— [78]

Mr. Prim (Interposing): I can't hear.

The Court: You will have to speak up.

A. (Continuing): He was talking to me about how much to charge these——

(Testimony of Patsy Ruth McCandless.)

Mr. Kosher (Interposing): Just a minute. I object to that on the grounds it is immaterial.

The Court: Well, it would seem to be immaterial. The Court will sustain the objection at this time.

Mr. Kosher: May we have the Jury instructed to disregard the answer?

Mr. Harris: May I lay a further foundation, your Honor?

The Court: You may proceed.

Q. (By Mr. Harris): And was this—did you have a conversation with Sam Blassingame?

A. Yes, I did.

Q. At 724 22nd Avenue South? A. Yes.

Q. And when was this?

A. When was this?

Q. Yes, was it right after you moved there, or a month——

A. Yes, right after I moved there.

Q. The day after, or two days, or what? [79]

A. Well, we moved in that night.

Q. All right, and when was this conversation?

A. He talked to me the same night.

Q. All right; was Pat Lewis present at that time that he talked to you?

A. Yes, she was in the house.

Q. Was she present in the same room, so that she could hear the conversation?

A. No, she was upstairs.

Q. All right. Now, was anyone else present

(Testimony of Patsy Ruth McCandless.)

when this conversation was had by you with Sam Blassingame? A. No.

Q. And what was that conversation?

Mr. Harris: Wait a minute. We will see if——

Mr. Kosher: I object to that on the grounds it is immaterial.

The Court: Well, I don't know what the conversation is yet, so that you may proceed with the answer.

Q. (By Mr. Harris): What was that conversation?

A. Well, it was about how much to charge these men that we were going to have times with.

Mr. Kosher: I object to it on the grounds it is immaterial and move that it be struck.

The Court: Objection overruled. [80]

Q. (By Mr. Harris): What kind of times with men were you going to have?

A. Well, he told me to charge them ten dollars.

Q. For what?

A. For having intercourse with them.

Q. All right. Now, did you perform tricks of prostitution then, at that house?

A. Yes, I did.

Mr. Kosher: Just a minute. I object on the grounds it is immaterial, and tends to prove a separate and distinct crime, and has no bearing on any of the issues in this case.

The Court: Objection overruled.

The Court again calls the Jury's attention to the fact that evidence of another crime other than

(Testimony of Patsy Ruth McCandless.)

charged here is not to be used by you in determining the guilt of the defendants in this case.

It may have some bearing on the intent and purpose of the defendants on the charge here alleged.

Q. (By Mr. Harris): To your knowledge, did Pat Lewis perform acts of prostitution at that address? A. Yes.

Q. How long were you and Pat Lewis working there as [81] prostitutes?

A. For about one month.

Q. Did you earn any money at that time?

A. Yes, I did.

Q. Approximately how much?

A. Well, at night, I made from seventy to eighty dollars.

Q. A night? A. Yes.

Q. What did you do with that money, if anything?

A. I gave it to Sam Blassingame, every penny of it.

Mr. Kosher: I object to that on the grounds it is immaterial and tends to prove the commission of a separate and distinct crime, and has no relationship to the issue in this case.

The Court: Objection overruled. The Court will rule as before, and give the same instruction as a moment ago to the Jury in regard to this answer.

Q. (By Mr. Harris): Did you ever see what Pat Lewis did with her money?

A. Yes, I did, once.

Q. What did you see?

(Testimony of Patsy Ruth McCandless.)

A. I seen her give it to Sam Blassingame. [82]

Q. All right; did she ever make a statement to Sam Blassingame about the amount of money she earned?

A. Yes; not the amount, but she mentioned this much: we were all downstairs, and he wouldn't get her clothes out of the cleaners and he was getting mine out and she said "'I don't see why you won't get mine out, because I make more morney in a night than she makes in one week."

Q. Did Pat Lewis ever have a conversation with you at that time that you were living at 724 22nd Avenue South concerning a trip to Portland?

A. Yes, she mentioned something about Portland when Sam had went to Portland.

Q. She did? A. Yes.

Q. Do you know when that was, when that conversation took place?

A. Well, it would have been about two weeks after we were living in this house.

Q. Is that the best of your recollection?

A. Yes, it is.

Q. Was anyone else present when she said that?

A. No, her and I were just there.

Q. What did she say then?

Mr. Kosher: Just a minute. On behalf of the Defendant Blassingame, I object on the grounds it is hearsay [83] as to him.

The Court: This testimony is not binding and will not be considered as to the Defendant Blassingame, the conversation with the Defendant Lewis,

(Testimony of Patsy Ruth McCandless.)

until such time as the Jury may determine, after all the evidence is in, that there may have been a conspiracy and then it may be considered as to the Defendant, but first, you must find before this testimony may be considered as to the Defendant Blassingame—in other words, conversation with Lewis—there must first be a finding on your part beyond a reasonable doubt that the Defendants were engaged in a conspiracy alleged in the Indictment.

Mr. Kosher: Furthermore, if your Honor please, as I understand the testimony, this took place after these Defendants were arrested.

The Court: The dates haven't been fixed here.

Mr. Kosher: I think that the Government should fix the time, then.

The Court: It should.

Mr. Harris: I intend fixing the date of the arrest on this charge, yes, your Honor; but yet there is no testimony to that effect.

The Court: I don't know if the date of the conversation is very specific. It may be, however. I think she said after she was there two weeks. [84]

Mr. Harris: And she said that was her best recollection.

Q. (By Mr. Harris): Is that correct?

A. Yes.

Mr. Prim: I got it she said she went there sometime in January, and he asked whether the first or the last part of January, and she couldn't say.

The Court: If you wish to have it fixed more closely——

(Testimony of Patsy Ruth McCandless.)

Mr. Prim (Interposing): Yes, your Honor.

The Court: All right, the Government may——

Mr. Harris (Interposing): I intend to fix that time by another witness so that there will be no question. This witness, I believe I have exhausted her recollection.

The Court: Let me ask a question or two.

With regard to these conversations you had, this last conversation with the Defendant Pat Lewis, what is—that occurred at 724 Twenty-second Avenue South?

The Witness: Yes, it did.

The Court: What is your best recollection as to the date? Was it in January?

The Witness: In the same month.

The Court: January, 1953?

The Witness: Yes. [85]

The Court: What is your best recollection as to the part of January?

The Witness: Well, your Honor, I don't know, because I am not very good at keeping up with dates.

The Court: You stated, I believe, it was about two weeks after you moved in the house at 724 22nd Avenue South?

The Witness: Yes.

The Court: And that is as close as you can fix it?

The Witness: Yes.

The Court: And it was in January?

The Witness: Yes.

(Testimony of Patsy Ruth McCandless.)

The Court: It would seem about as close as we can fix it, Mr. Prim. If you wish to ask more questions——

Mr. Kosher: Might I ask her further questions? Do you know whether or not this conversation you say you had with Pat Lewis took place after she had been arrested by the city police and some airplane tickets were taken from her person?

The Witness: It took place before she had been arrested.

Mr. Kosher: Before she had been arrested?

The Witness: That is right.

Mr. Kosher: You are sure of that? [86]

The Witness: Yes, I am sure of it.

Mr. Kosher: Was that in the early part——

Mr. Harris: Now, we are getting beyond this, because the next question that is asked——

The Court (Interposing): I think——

Mr. Harris (Continuing): I can anticipate it.

The Court (Continuing): ——the most we can do here is to get her best recollection as to time. Any other question as to time of this meeting, the Court would consider. Have you any further question on that issue?

Mr. Kosher: Well, I guess that is it. I cannot ask her any more questions.

Mr. Harris: I think he can, but at the proper time, your Honor.

The Court (In cross-examination): I am talking about voir dire.

(Testimony of Patsy Ruth McCandless.)

Q. (By Mr. Harris): What, if anything, was said then by Pat Lewis to you concerning a trip to Portland?

A. Well, she said that her and Sam went to Portland.

Mr. Prim: I can't hear you.

The Court: Speak up a little louder.

A. (Continuing): She said her and Sam had went to Portland. [87]

Q. (By Mr. Harris): Had went?

A. Had gone to Portland; had already been to Portland.

Q. All right. A. Yes.

Mr. Harris: Your witness.

Cross-Examination

By Mr. Kosher:

Q. Now, you say that conversation and all these transactions took place sometime in the early part of January, 1953?

A. I didn't say in the early part, because I don't remember the date or anything.

Q. Now, could it have taken place in December?

A. No, it didn't take place in December. It was in January, but about the time I do not remember.

Q. Now, did you know both of these people before you went out to this house?

A. Yes, I knew them both before I went out there.

Q. How long had you known them?

(Testimony of Patsy Ruth McCandless.)

A. How long had I known them before?

Q. Yes.

A. I had just met Sam about three or four days before we went out there.

Q. Now, you are sure that this going to the house, [88] practicing prostitution, and having all these conversations that you testified to, took place before Pat Lewis was arrested, and the airplane tickets taken from her person?

Mr. Harris: Just a minute, your Honor. I will object to that, unless Counsel will say when she was arrested.

Mr. Kosher: Let me ask you this:

Q. (By Mr. Kosher): Do you know when she was arrested by the city police and the airplane tickets taken from her person?

A. No, I do not.

Q. You don't know that? A. No.

Q. All right, now, if she were arrested January 6th, 1953, would you say that all these activities took place before that?

A. I beg your pardon?

Q. If she were arrested January 6th, 1953, would you say that all these activities you testified to took place before that date?

A. As I said before, I don't remember dates too good.

Q. Well, now, didn't you tell me a little while ago that all this took place after she was [89] arrested?

Mr. Harris: I will object to this questioning

(Testimony of Patsy Ruth McCandless.)

with the hope that your Honor will overrule me so that I can pursue this matter a little further on the arrest.

The Court: Do you object, or withdraw the objection?

Mr. Harris: No, I object, your Honor.

The Court: On what ground?

Mr. Kosher: I will withdraw my question.

Q. (By Mr. Kosher): Now, young lady, what we are trying to get at is when these activities took place.

You say sometime in January, 1953, is that right?

A. That is right, yes.

Q. And how do you fix the time; can you tell us that?

A. No, I can't, because I don't remember the date. I keep saying it over and over, I do not remember the date.

Q. Well, can you tell us about when it was?

A. No, I can't.

Q. Did it take place in December or January or February, or when? A. In January.

Q. How do you know it was January?

A. How do I know it was January?

Q. Yes; you say you are not good at dates, but how [90] do you know it was in the month of January? Is there anything that fixes that month in your mind?

A. I know when I moved to Beulah Smith's house, it was in January.

Q. All right, what part of January?

(Testimony of Patsy Ruth McCandless.)

The Witness: Do I have to answer?

Mr. Harris: If you can.

A. I keep telling him I don't remember the dates.

Q. (By Mr. Kosher): Well, was it the first part of January?

A. I don't know whether it was the first part of January, the middle part of January, or the last part. It was in January, and that is all I remember.

Q. You don't know whether it was the first or the middle, or the last part? A. No, I don't.

Q. Now, have you ever been convicted of a crime? A. Yes, I have.

Q. And what time?

A. For disorderly conduct.

Q. And when?

A. When I first came to Seattle.

Q. When you first came to Seattle; that was how many years ago?

A. That was two years ago. [91]

Q. Now, when you say "disorderly conduct," that involves an act of prostitution, does it?

A. No, it did not.

Mr. Harris: I will object, your Honor.

I will withdraw my objection. The answer is in.

Q. (By Mr. Kosher): Now, as a matter of fact, you have been a professional prostitute for a number of years, haven't you? A. No, I have not.

Q. You practiced prostitution back in Shreveport, Louisiana?

(Testimony of Patsy Ruth McCandless.)

A. I have never been arrested for prostitution.

Q. I didn't ask you that.

A. And I never practiced; no, I did not, and I never practiced prostitution no place except when I started here.

Q. When you were living out at Mrs. Smith's place, what did you do for a living?

A. Mrs. who?

Q. Where were you living?

A. At Beulah Smith's.

Q. Mrs. Smith? A. Yes. [92]

Q. What were you doing for a living there?

A. I had a job at Snow Flake Laundry, and I had just quit, and I had a check coming from this job when I quit, and that is when I met Sam and I started practicing prostitution with Sam.

Q. Now, as a matter of fact, hadn't you been practicing prostitution out at Mrs. Smith's house for some time prior to the time you met Sam Blassingame? A. No.

Q. Isn't it a fact that she also practiced prostitution?

A. What she does, I do not know, and I don't have anything to do with what she does.

Q. You lived there, didn't you?

A. I most certainly did. Just because I lived there, does that make me snoop in her business to know what she is doing?

Q. You say you are 21 years of age?

A. That is right.

Q. Are you married? A. That is right.

(Testimony of Patsy Ruth McCandless.)

Q. Where is your husband?

A. He is in Los Angeles.

Q. You are not living with him at the present time? A. No, I am not. [92-A]

Mr. Kosher: I think that is all.

Cross-Examination

By Mr. Prim:

Q. Now, young lady, you stated that on one occasion you saw Pat Lewis give to Sam Blassingame some money? A. That is what I said.

Q. Do you know how much that was?

A. No, I don't know how much that was.

Q. Do you know of your own personal knowledge whether she was repaying him back for a loan, or anything else?

A. I beg your pardon?

Q. Do you know of your own personal knowledge whether or not she was repaying Sam Blassingame for money she had borrowed?

A. Of course, I knew she wasn't repaying him money she had borrowed.

Q. How do you know that?

A. How do I know that?

Q. Yes.

A. I know it because when Sam carried over——

Q. (Interposing): I am asking you if you know of your own personal knowledge on that particular occasion what the money was given to Sam Blassingame for.

(Testimony of Patsy Ruth McCandless.)

A. I just told you, yes, I know. [93]

Q. And then the only way that you knew is because Sam Blassingame had taken you and you performed acts of prostitution and you gave Sam Blassingame your money?

A. Yes, I gave him my money.

Q. You don't know what arrangements he had with Pat Lewis? Or if he had any arrangements at all, isn't that true?

A. I most certainly do know.

Q. How do you know that?

A. Because we discussed before me, Sam and Pat Lewis; that is how I know.

Q. And when did you discuss that before?

A. When we were moving her from her place.

Q. And when did he move her?

A. Right after he got this house.

Q. Pardon?

A. Right after he got this house.

Q. And how long after he got back in town did he go to that place?

A. He moved me one night, and moved her the next night.

Q. And what date was that?

A. I don't know what date it was.

Q. Was that in February?

A. I said I didn't know the date. [94]

No, it wasn't in February.

Mr. Prime: No further questions.

(Testimony of Patsy Ruth McCandless.)

Redirect Examination

By Mr. Harris:

Q. Mrs. McCandless, you have been asked a number of questions concerning the date? A. Yes.

Q. Do you recall the actual renting of the house at 724 22nd Avenue South? A. Yes.

Q. If that date were to be established to be on or about January 21, 1953, would that conversation have occurred one or two days before that and two weeks after that date?

A. Will you say that over again, please?

Q. Are you sure of the date—do you remember definitely the date that the house at 724 22nd Avenue South was rented?

A. Do I remember the date?

Q. Do you remember the renting of the house?

The Court: The question here is the renting of the house, or the date?

Mr. Harris: No, the renting of the house; the actual negotiations to rent the house.

A. Do I remember that? [95]

Q. (By Mr. Harris): Yes.

A. You mean, do I remember the date?

Q. No, do you remember the negotiations between Sam Blassingame and the real estate agent for renting that house? A. Yes.

Q. Are you sure of that now?

A. Yes, I am.

Q. So that, if that date can be fixed——

(Testimony of Patsy Ruth McCandless.)

A. (Interposing): Yes.

Q. (Continuing): ——as being January 21, 1953, would that be a definite date in your mind?

Mr. Kosher: What date is that, Counsel?

Mr. Harris: January 21, 1953.

Q. (By Mr. Harris): As the date that the house was rented, would that be a definite date then in your mind as to the relationship of these conversations with Sam Blassingame and Pat Lewis; do you understand my question?

A. Yes, I understand it. I think I understand it, yes.

Q. Have you an answer to it? A. Yes.

Q. And what is your answer? [96]

A. Yes.

Mr. Harris: All right, your witness.

Recross-Examination

By Mr. Kosher:

Q. Now, are you and Mr. Blassingame good friends right now?

A. What do you mean, are we good friends?

Mr. Harris: I object to that. I asked one question on rebuttal.

The Court: Objection sustained.

Mr. Kosher: I would like the right to renew my cross-examination of this witness. I overlooked something.

The Court: The Court will grant the request. You may proceed.

Q. (By Mr. Kosher): Will you tell me whether

(Testimony of Patsy Ruth McCandless.)

or not you and Sam are on friendly terms right now? A. Yes, I can tell you.

Q. Are you? A. No.

Q. Isn't it a fact that you wanted him to divorce his wife and marry you?

A. How could that be, when I am already married? No, that is not true. [97]

Q. Didn't you tell him——

Mr. Harris: Your Honor, for the record, may I object to these last two questions that have been asked on the grounds they are immaterial and ask that the answers be stricken?

Mr. Kosher: If they go to show her bias and prejudice——

The Court: They have been answered. The Court will let them stand.

Mr. Harris: All right, thank you.

Q. (By Mr. Kosher): As a matter of fact, you had Mr. Blassingame arrested once, didn't you?

A. Yes, I had him arrested because Mr. Blassingame beat me up and wouldn't give me my clothes.

Q. Then, from that time on, you and he have been on very bad terms, isn't that right?

A. That is right.

Q. And didn't you threaten Mr. Blassingame and tell him you were going to try and send him to the penitentiary if you could?

A. No, if anything, Mr. Blassingame threatened me. No, I did not.

Q. You knew he was a married man, didn't you?

(Testimony of Patsy Ruth McCandless.)

A. Didn't I know he was a married man? He knew I was [98] a married woman.

Q. That isn't the question.

A. I heard he was living with a woman, but I didn't know Sam Blassingame was married.

Q. You knew he had three children, too, didn't you? A. No, I did not.

Mr. Kosher: I think that is all.

Re-Redirect Examination

By Mr. Harris:

Q. Now, why did Sam beat you up?

A. Because I told him I was going to leave him.

Q. And by "leave him," you meant what?

A. I meant stop giving him my money.

Q. From doing what?

A. From practicing prostitution for him.

Q. And what did he say?

A. He—after then, I came down on Jackson Street and a guy by the name of Johnny Clark and I was in a little shoeshine parlor.

Q. Don't say anything Johnny Clark said. What did Sam Blassingame do or say?

A. He came in there.

Q. Who did?

A. Sam Blassingame, in the place I was, and jumped on me and beat me, and kicked me, and told me why wasn't I out [99] on the street hustling.

Q. By "hustling," what was meant?

A. Out selling my body in prostitution.

(Testimony of Patsy Ruth McCandless.)

Mr. Harris: That is all.

Re-Recross-Examination

By Mr. Kosher:

Q. As a matter of fact, you had a house you were practicing prostitution in, didn't you?

A. Who had a house?

Q. Didn't you testify you were always in a house? A. Sam Blassingame had.

Mr. Harris: May I object to Counsel interrupting the answer?

The Court: I will object to the question and sustain the objection.

Mr. Kosher: Did you sustain the objection?

The Court: Yes, I don't think it is proper re-cross-examination on this issue.

Mr. Kosher: Well, I think the girl testified he beat her up and told her she ought to be out on the street and my purpose is to show she was never out on the street and she always practiced in a house.

The Court: Well, it might be assumed——

The Witness (Interposing): I can answer that question. [100]

The Court: Well, the Court will sustain the objection without further comment.

Mr. Kosher: All right. I think that is all.

Mr. Prim: That is all.

Mr. Harris: That is all, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Kosher: Now, if your Honor please, I move that all the last witness' testimony be stricken on the ground it hasn't any relevancy.

Counsel fixed the date January 23, 1953. The evidence in this case was that these people were arrested on the 6th day of January, 1954.

Mr. Prim: 1953.

The Court: Well, the record may show your motion and the motion will be denied at this time.

Mr. Harris: I would like to call Mr. Winston, but I understand he is not here.

The Court: Well, it is recess time.

We will take a fifteen-minute recess. Ladies and gentlemen of the Jury:

We will now take the afternoon recess, and the Court calls your attention to the admonition given earlier that you are not to discuss this case, or to reach a conclusion thereon until it is finally submitted to you for [101] your verdict.

You may now be excused, and the Court will remain in session while you leave.

(Whereupon, the Jury retired from the courtroom.)

The Court: Court will recess for fifteen minutes.

Mr. Harris: Thank you, your Honor.

(Whereupon, at 3:10 o'clock p.m., January 21, 1954, a recess was had until 3:25 o'clock p.m., January 21, 1954, at which time, Counsel and Defendants heretofore noted being present, the following proceedings were had, to wit):

Mr. Harris: Your Honor, may the record show at this time I am filing the Plaintiff's requested instructions, and I am serving a copy on the Defendant.

The Court: All right.

You may call the Jury.

The Bailiff: One Defendant is not here, your Honor.

The Court: Where is the Defendant?

Mr. Prim: She will be back in just a minute, your Honor.

(Whereupon, there was a brief pause.)

The Court: You may call the Jury.

Mrs. Lewis, I must advise you you must observe the hours of the recess. When you are not here, we cannot continue. [102]

Mr. Prim: May I advise the Court she is sick, and she was supposed to be to the Doctor. That is the reason for the delay. She is going to the Doctor as soon as we are through here.

The Court: Those are matters that happen to persons, and you should advise your Counsel in advance, so that he may advise the Court so that everyone is aware of what the circumstances are.

(Whereupon, the Jury was returned to the courtroom.)

The Court: You may be seated.

It is stipulated that the Jury and the Defendants are present in the courtroom?

Mr. Harris: Yes, your Honor.

The Court: You may proceed, Mr. Harris.

Mr. Harris: We will call Mr. Winston. [103]

* * *

MILLARD M. BUSH, JR.

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: I want your name and the spelling of it.

The Witness: Millard M. Bush, Jr.

Direct Examination

By Mr. Harris:

Q. Would you state your name, please, for the record? A. Millard M. Bush, Jr.

Q. And what is your occupation?

A. I am a Special Agent with the Federal Bureau of Investigation.

Q. And what is your address?

A. 16802 Eleventh Place Northeast.

Q. And where are you assigned with the Federal Bureau of Investigation? A. Here in Seattle.

Q. And how long have you been so assigned to Seattle? A. Since December 12, 1951.

Q. Were you serving here in Seattle on January 6th, 1953? A. I was. [110]

Q. And in what capacity?

A. As a Special Agent of the F.B.I.

Q. Did you have occasion on that date to talk to the Defendant Pat Lewis? A. I did.

Q. Where? A. At the Seattle City Jail.

(Testimony of Millard M. Bush, Jr.)

Q. When? A. On January 6th.

Q. What time? A. 1953.

Q. What time, sir?

A. In the morning, just prior to her going to court.

Mr. Prim: I didn't hear that.

The Witness: In the morning.

Q. (By Mr. Harris): Was there anyone else present at the time of this conversation?

A. Yes, Dean Ralston, also, was there.

Q. And what, if anything, did you say to the Defendant? Did you identify yourself?

A. Yes, sir; we identified ourselves as Special Agents of the F.B.I.

Q. Did you say anything else to her?

A. We advised her that she did not have to talk to [111] us; she did not have to say anything, but anything she might say could be held against her in a court of law, and we told her she had a right to an attorney.

Q. Did she talk to you after that?

A. She did.

Q. And what did she say?

Mr. Kosher: Just a minute. I object on the ground it is hearsay as to the Defendant Blassingame.

The Court: I will advise the Jury again, as in previous occasions, in similar situations, that the testimony as to a conversation with one defendant is not binding upon the other defendant, and is not to be considered by the jury until after they

(Testimony of Millard M. Bush, Jr.)

should find, when the case is finally submitted to them, that there is, in their judgment, a conspiracy, found by the Jury beyond a reasonable doubt from the evidence that is given, and then may be considered as against both defendants at such time if such a condition is found by you to exist.

You may proceed.

Mr. Harris: Thank you.

Q. (By Mr. Harris): What, if anything, did she say?

A. She advised that on the evening of December 31, 1952, she went to Portland, Oregon, to visit friends, whom she identified as Gangster Mack and Alvina Neuman, and [112] identified those persons by their true names as Madison Wilson.

I meant Little Bit, she identified Little Bit as Alvina Neuman, and she said she went to visit them and she arrived in Portland before midnight, New Year's Eve, December 31 of 1952, and took a taxi to the Chamberlin Hotel, where she registered, and she advised she then went to bed and got up the next day and went to a tavern which was located in Portland, and asked where Alvina Neuman and Madison Wilson were. She found out at this tavern where their new address was. They had moved to a new address. She could not recall the new address, and she took a cab out to the new address and visited them.

She stated she stayed at the Chamberlin Hotel approximately two or three days, and then she moved in out at Madison Wilson's house and stayed

(Testimony of Millard M. Bush, Jr.)

there until January 5, 1953, when she decided to return to Seattle.

She stated that she went to the airport at Portland and there she observed Sam Blassingame.

This was the first time, according to Pat Lewis, that she had seen Sam Blassingame since she left Seattle on New Year's Eve.

She stated that she had known Sam Blassingame merely as an acquaintance, and had no connection whatsoever [113] with Sam Blassingame.

She spoke to Sam Blassingame, and the two decided that they would purchase the tickets as man and wife on United Air Lines inasmuch as that would benefit them as man and wife, the wife could travel at half fare.

She stated that she gave Blassingame the money for her ticket, and Blassingame purchased the two tickets and she stated that the two rode side by side in the plane from Portland to Seattle, and that they arrived in Seattle somewhere after 6:00 p.m. on January 5, 1953, and that they then took the same taxi to an address off of Jackson Street, where Blassingame obtained his car and drove her to 3009½ East Spruce Street.

She stated that subsequently early that morning on January 6th, shortly after midnight, she was arrested by Sergeant Scott and taken to the police station where she was booked.

She admitted tearing the names off of the tickets, Mr. and Mrs. Blassingame from the United Air Line tickets by which they gained passage from

(Testimony of Millard M. Bush, Jr.)

Portland to Seattle, and explained her actions, indicating that Sergeant Scott had been trying to get something on Blassingame, and that she herself was a prostitute and she felt the tickets were incriminating, and she was trying to destroy them. She denied any connection whatsoever with Blassingame and [114] stated he was only a friend and merely an acquaintance that she had met previously in Seattle.

Q. Was that the extent then of your interview at that time? A. That is right.

Q. Mr. Bush, do you recall the date on which a complaint was filed against the Defendant Sam Blassingame and Patricia Lewis, alias Pat Lewis, for the violation of this alleged crime?

A. To the best of my recollection, it was December 3, 1953.

Mr. Harris: Thank you. Your witness.

Cross-Examination

By Mr. Prim:

Q. Now, Mr. Bush, she told you that she had no connection with Sam Blassingame whatsoever, isn't that correct? A. That is true.

Q. And that they travelled—they bought the tickets and she gave him the money and that they travelled because they could get a cheaper rate, isn't that right? A. That is true.

Mr. Prim: No further questions.

(Testimony of Millard M. Bush, Jr.)

Cross-Examination

By Mr. Kosher: [115]

Q. Now, she didn't tell you, did she, that she came over here to Seattle so that she could engage in prostitution, did she? A. She did not.

Q. And did she tell you that she was going to come back to Seattle whether Sam Blassingame was there or not? A. She did not.

Q. Didn't she tell you that she was going to return to Seattle and that it was her intention to return to Seattle when she went to the airport?

A. I don't recall her saying that.

Q. Didn't she tell you when she got to the airport she met Sam Blassingame there?

A. That is right.

Q. And did she tell you what she went to the airport in the first place for?

A. Yes, she said she was going to Seattle.

Q. And she said that her ticket was bought with her own money, is that right?

A. That is true.

Q. And she said that Sam bought his own ticket? A. That is true.

Q. Didn't she also tell you that she knew Sam Blassingame was a married man and the father of three small children? [116]

A. I don't recall discussing Blassingame's marital status at all.

(Testimony of Millard M. Bush, Jr.)

Q. You don't remember that at all; how long did you talk to her, Mr. Bush?

A. Approximately forty-five minutes.

Q. You talked to her more than once, did you?

A. Yes.

Q. How many times did you talk to her?

A. Subsequently, that afternoon. I had suggested she speak with her attorney, Mr. Prim, and I talked to her subsequent to that and asked her if she had anything further to say, and I also talked to her on February 1, 1953, and on January 14th of this year, 1954.

Q. Now, on each of these conversations, didn't you tell her that if she would say Sam Blassingame brought her from Portland to Seattle for the purpose of engaging in prostitution, you would see that nothing would happen to her?

A. We never make any promises.

Q. I ask you if you made any such statement to your knowledge? A. I answered "No."

Q. Did you ever tell her that the FBI was not interested in her at all, but in Sam Blassingame?

A. No, I didn't tell her that. [117]

Q. Did you tell her anything other than you have testified to here?

A. Yes, we talked about, on the 14th of this month here, we talked about Pat's future. She stated that she thought maybe she would reform and that she had written a story and was contemplating going into journalism and pointed out

(Testimony of Millard M. Bush, Jr.)
that she felt that she would leave her career of vice behind.

Q. Didn't she tell you that she had gone all over the United States by herself and that nobody had taken her there?

A. I don't recall her saying that, no.

Q. Didn't she tell you she had gone to Montana and worked at various houses of prostitution there?

A. I don't recall. I have heard her say that she worked as a prostitute in California and Utah, and Seattle, too.

Q. You don't remember her telling you that she didn't need anyone to take her any place, that she could go by herself? A. I don't recall that.

Mr. Kosher: I think that is all.

Mr. Prim: No further questions.

Mr. Harris: Nothing further, your Honor.

The Court: You may step down, Mr. Bush. [118]

(Witness excused.)

Mr. Harris: The Government rests, your Honor.

The Court: The Government rests.

Mr. Kosher: The Government rests?

Well, we would like to make some motions at this time, and would like to make them in the absence of the Jury.

The Court: Ladies and gentlemen of the Jury:

The Court again will excuse you for a short recess, while the Court hears motions on behalf of the Defendant or other applications for legal relief.

The Court calls your attention to the admonition

given earlier. It applies on this occasion, as before.

We will call you back as soon as we have concluded with the hearing in your absence.

(Whereupon, the Jury retired from the courtroom.)

Mr. Kosher: Your Honor, might I stand up here?

The Court: Yes, you may.

Mr. Kosher: Your Honor, if the Court pleases, on behalf of the Defendant Sam Blassingame, I now move this Honorable Court for a directed verdict of acquittal, or, in the alternative, that the Court order this case dismissed on the grounds that the Government has failed to prove a prima facie case against the defendants. [119]

* * *

The Clerk: The Defendants are not here, your Honor.

Mr. Kosher: Mr. Prim is out in the hall now. You recall last evening she was not feeling too well.

Mr. Prim: My client is not here, your Honor. I have received no word from her this morning. I was out in the hallway, but she wasn't there. I don't know.

The Court: Is your client here, Mr. Kosher?

Mr. Kosher: No.

The Court: He isn't, either? Do you think—have you heard from either of them?

Mr. Kosher: No.

Mr. Prim: No.

Mr. Kosher: They live in the South End. They

may have had some trouble in getting in to town. I don't know how the weather is in that end.

The Court: I suggest you make some effort to determine what is delaying them, and we will take a recess until 10:15, and you may get some report on it.

(Whereupon, at 10:05 o'clock a.m., January 22, 1954, a recess was had until 10:07 o'clock a.m., January 22, 1954, at which time, Counsel and Defendants heretofore noted, being present, the following proceedings were [143] had, to wit):

The Court: Have the Defendants any statement to make regarding their tardiness?

Mr. Kosher: Yes, if your Honor please, the car was stuck in snow, and that is the reason they were late.

The Court: That applied likewise to the——

Mr. Prim: They both came together, your Honor.

The Court: All right, the record may so show.

As to the motions made last night, the Court denies the motions without prejudice to their renewal. Of course, the Court's denial doesn't prejudice you, anyway, but the Court wishes to indicate that they may be made at the close of the Defendants' case, and the Court will, in all probability, reserve ruling at that time until after the case comes back from the Jury.

So, we will call the Jury. I received one requested instruction from the Defendants.

Mr. Kosher: That is for both of them, your Honor. We are collaborating on the instructions.

The Court: That is all?

Mr. Kosher: That is all.

(Whereupon, the Jury was returned to the courtroom.)

The Court: You may be seated. It is stipulated that the Jury and the Defendants are present in the courtroom? Mr. Harris? [144]

Mr. Harris: Yes, your Honor.

The Court: Mr. Prim and Mr. Kosher?

(Whereupon, Mr. Prim and Mr. Kosher nodded in the affirmative.)

The Court: You may proceed, Mr. Prim and Mr. Kosher.

(Whereupon, opening statement was made for and on behalf of the Defendant Songahid by Mr. Prim and the following proceedings were then had, to wit):

(Whereupon, opening statement was made for and on behalf of the Defendant Blassingame by Mr. Kosher and the following proceedings were then had, to wit):

Mr. Prim: Will you be sworn? [145]

MARY DONNA SONGAHID

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Prim:

Q. Will you state your name?

A. Mary Donna Songahid.

Q. Are you known by any other name?

A. Patricia Lewis and Pat Lewis.

Q. I will ask you whether or not you know Sam Blassingame? A. Yes.

Q. Do you know his wife? A. Yes.

Q. How long have you known him?

A. Since 1949.

Q. Who did you meet first?

A. Mrs. Blassingame.

Q. Did she introduce you to her busband?

A. Yes.

Q. Now, you have had brushes with the law in prostitution and dope, isn't that correct?

A. Yes.

Q. And when? [146]

A. Here in the last five or six years.

Q. In Seattle? A. Yes.

Q. And you have been convicted of prostitution and dope, isn't that right? A. Yes.

Q. Now, calling your attention to the end of 1952, December, 1952, I will ask you whether or not you went to Portland? A. Yes.

(Testimony of Mary Donna Songahid.)

Q. And approximately what month, what time did you go to Portland?

A. It was New Year's Eve.

Q. What time did you arrive in Portland, do you remember?

A. No. About one hour after I left. It was around seven or eight o'clock in the evening, I believe.

Q. Did you go down by plane? A. Yes.

Q. I will ask you whether or not you stopped at a hotel or with friends?

A. I went to a hotel.

Q. And what hotel was it?

A. Chamberlin Hotel.

Q. Now, how long did you stay at the Chamberlin Hotel? [147]

A. I kept the room there until I was ready to come back to Seattle.

Q. And when did you get ready to go back to Seattle? A. On the fifth of January.

Q. I will ask you whether or not you saw Sam Blassingame on the fifth of January?

A. I saw him at the airport in Seattle—in Portland, Oregon.

Q. I will ask you whether or not that is the first time you had seen him in Portland on that trip? A. Yes, it was.

Q. Did you talk to him at that time?

A. I talked to him at the airport, yes.

Q. And what was the gist of your conversation with him?

(Testimony of Mary Donna Songahid.)

A. He asked me if I was coming back to Seattle, and I told him that I was.

Q. And what transpired as to the tickets?

A. Well, I gave him my money, and he bought the tickets.

Q. And why did you do that?

A. We could get them a little cheaper that way.

Q. That was a family plan at that time? [148]

A. Yes.

Q. In getting them?

And I will ask you whether or not you came back with him on the plane? A. Yes.

Q. Was there any conversation or anything said regarding your coming to Seattle to practice prostitution for him?

A. No, when we were on the plane, he sat by the window, and I sat next to the aisle most of the way in there.

Q. Approximately what time did you get to Seattle, do you know?

A. I couldn't say truthfully, what time it was. It was after dark.

Q. Approximately how long did it take you?

A. About 45 or 50 minutes.

Q. And upon arriving at Seattle, what type of conveyance did you get to come to Seattle?

A. We took a Yellow Taxicab from the airport up to my apartment.

Q. Was that the Bow Lake Airport?

A. No.

Q. Seattle-Tacoma?

(Testimony of Mary Donna Songahid.)

A. Seattle-Tacoma. [149]

Q. And you both got in the taxi, did you?

A. Yes.

Q. And you went to your home? A. Yes.

Q. I will ask you whether or not you had any conversation with Sam Blassingame during that trip from the airport to your home regarding prostitution? A. None whatsoever.

Q. What did you do, if anything, upon arriving at your home?

A. I got my suitcase and got out of the cab and told him to tell Mrs. Blassingame I would be by to see her tomorrow.

Q. And what address was it you got out at; where were you living?

A. 3009½ East Spruce.

Q. I will ask you whether or not you were not arrested on January 6th, the early morning of January 6th? A. Yes.

Q. And who arrested you?

A. Sergeant Scott, and I don't recall the other officer's name.

Q. And were you taken to the jail?

A. Yes.

Q. And what charge did they place against you? [150]

A. Illegal possession of narcotics and prostitution.

Q. I will ask you whether or not subsequently you had a trial on those charges? A. Yes.

Mr. Harris: I object to that, your Honor. I

(Testimony of Mary Donna Songahid.)
think it is immaterial what other trials she has had.

The Court: Well, it has been gone into on the Government's case, possibly through cross-examination, and I think it is permissible.

Q. (By Mr. Prim): What was the result of that trial?

Mr. Harris: I will object, again, your Honor. Immaterial.

The Court: Objection overruled.

A. They were, both cases were, dismissed, on illegal arrest.

Q. (By Mr. Prim): I will ask you whether or not you had the tickets in your pocket on the plane? A. Yes, I did.

Q. And what happened in regards to those tickets when you were arrested on the early morning of the sixth?

A. Sergeant Scott took the tickets from my pocket and said, "What is this?" And I grabbed them out of his [151] hand and tore them, and he took them back.

Q. Those were the same tickets that you received, the folders for the tickets?

A. Yes, I had forgotten I had them.

Q. Do you know the Mrs. Smith, the witness that testified here? A. Yes, I know her.

Q. How long have you known her?

A. I met her the same night we were released from this arrest we are talking about. I think it was the ninth of January.

Q. Do you know this Mrs. McCandless?

(Testimony of Mary Donna Songahid.)

A. Yes, I met her the same night.

Q. By the way, when were you released from that arrest? A. On the ninth, 9th of January.

Q. And what was the occasion of your going over to their place?

A. I didn't meet her at her place.

Q. Where did you meet her?

A. At 22nd and East Denny Way.

Q. At 22nd and East Denny Way; what was the occasion of your meeting her there?

A. I was over there visiting with some friends of mine, and she knew these people, and her and this [152] McCandless came over there.

Mr. Harris: "Her and * * *"?

The Witness: Pat McKenzie.

Mr. Harris: Who is the "Her," may I inquire?

The Witness: Mrs. Smith.

Q. (By Mr. Prim): I will ask you whether or not, did you go down, subsequently move to 724 22nd Avenue South? A. Yes.

Q. And when did you move there?

A. I don't remember the date, but this Patsy, I will call her that, I don't know how to pronounce her last name, she told me she was opening up a house over there, and she asked me if I would like to come and go to work, and I told her I wasn't well then, but I would like to work, and she said I could keep the room and work.

Q. Did you ever work at that house?

A. No.

(Testimony of Mary Donna Songahid.)

Q. Why; what was the reason?

A. I had female trouble; I was ill.

Q. How long did you stay there?

A. Two or three weeks' time.

Q. One moment. You heard Mrs. McCandless, or whatever her name is, say she saw you give Sam Blassingame some money? [153]

A. I have never given Sam Blassingame any money. I have borrowed money from him and paid him back, but I have never given him any money.

Q. You have never given him any money?

A. No.

Mr. Prim: That is all the direct.

Mr. Kosher: Might I cross-examine?

The Court: You may cross-examine. You may examine.

Cross-Examination

By Mr. Kosher:

Q. Now, Pat, when you went down to Portland on New Year's Eve, I believe you said, what was your purpose in going to Portland?

A. I went down there to go to work. I heard——

Q. (Interposing): When you say "go to work," you mean you were going to go to work as a prostitute down there? A. Yes.

Q. Was there any reason why you picked Portland instead of some other place?

A. I heard it was closed, and they were sneaking. You can make more money that way.

Q. What do you mean "sneaking"?

(Testimony of Mary Donna Songahid.)

A. You get more money. [154]

Q. You get more money for your work than when it is open? A. Yes.

Q. Did you go to work down there?

A. Yes, I worked down there.

Q. And why were you returning to Seattle?

A. Well, I had a habit of narcotics, and I was a stranger in Portland, and I didn't know where to get any, and I came back to Seattle to get my clothes and to get some more narcotics and to go back to Portland.

Q. And had you planned to return to Portland?

A. Yes.

Q. You had a place to work in Portland, is that right? A. Yes.

Q. When you got on the plane and went to the airport and started back to Seattle, did you have any intention at all to work in Seattle?

A. No, just get my clothes and——

Mr. Harris (Interposing): To work as——

Q. (By Mr. Kosher): To work as a prostitute? When you say "work," you mean as a prostitute, isn't that right?

A. Yes, to get my clothes changed and to make a connection [154-A] and go back to Portland.

Q. When you say "to make a connection," you mean to get somebody to supply you with narcotics, is that right? A. Yes.

Q. Prior to the time you left Portland, did you discuss at all with Sam Blassingame what your purpose in coming to Seattle was?

(Testimony of Mary Donna Songahid.)

A. No, I didn't tell him.

Q. Did you talk with him at all about practicing prostitution in Seattle? A. No.

Q. Did you talk about opening any house of prostitution in Seattle? A. No.

Q. After you got to the airport and Seattle, you say you took a Yellow Cab? A. Yes.

Q. And you went to your apartment, is that right? A. Yes.

Q. Did Sam Blassingame go into your apartment then?

A. No, he didn't even get out of the cab.

Q. Now, you say you met Mrs. Blassingame, Sam's wife?

A. I knew her before I knew Sam.

Q. I see; is she here in the courtroom? [155]

A. Yes, she is.

Q. Is that the little lady in the white bandanna?

A. Yes.

Q. And do you know Mrs. Blassingame's children? A. Yes.

Q. How many children does he have?

A. Three.

Q. On these dates we are talking about, you knew him to be a married man, didn't you?

A. Yes.

Q. You knew he was living with his wife?

A. Yes.

Q. Now, did he ever induce you or persuade you or conspire with you to go from Portland to Seattle for the purpose of you engaging in prostitution?

(Testimony of Mary Donna Songahid.)

A. No.

Mr. Harris: I object to the form.

The Court: The question is answered. Do you wish it stricken?

Mr. Harris: Yes, your Honor.

The Court: The Court believes the question is objectionable, and that it is compound, and on that ground will strike the question and answer, and the Jury will disregard it.

Mr. Kosher: May I ask another question, [156] please?

The Court: Yes.

Q. (By Mr. Kosher): Did you ever agree with Sam Blassingame that you would go with him from Portland to Seattle for the purpose of engaging in prostitution? A. No.

Q. Did you ever conspire with him to go from Portland to Seattle for the purpose of your engaging in prostitution?

A. No. We never had any conversation about prostitution or anything like that.

Q. Now, on the night that you returned, you say you were arrested by Sergeant Scott, is that right? A. Yes.

Q. And at that time he accused you of practicing prostitution, is that right? A. Yes.

Q. How did he get into your apartment?

A. Well, they knocked on the door, and I didn't open the door, and I have a knife through there because the Police had been up once before and broke the lock off, and I had the knife stuck

(Testimony of Mary Donna Songahid.)

through the door to hold the door closed and he pushed it open.

Q. In other words, he forced his way into the house, is that right? [157] A. Yes.

Q. Did you open the door for him at all?

A. No.

Q. Did you admit him into your apartment?

A. No.

Q. And then he took you to jail at that time, is that right? A. Yes.

Q. By the way, did he have a warrant for your arrest when he got there? A. No.

Q. You say after you got out of jail—by the way, when you got out of jail, you got out on bond, is that right? A. Yes.

Q. Did somebody have to post an appearance bond for you? A. A bondsman put it up.

Q. Put up bond for you? A. Yes.

Q. Let me ask you this:

When you got out of jail why didn't you go back to Portland? A. Why didn't I go back?

Q. Yes. [158]

A. I had to wait until this trial was over.

Q. And is that the reason—let me ask you this: After you got out of jail, you say you met the Smith girl and also you met the McCandless girl, is that right? A. Yes.

Q. When did you have conversation about going to work with the McCandless girl?

A. It was about two weeks after I was out on bond; ten days, something like that.

(Testimony of Mary Donna Songahid.)

Q. Did she contact you, or did you contact her?

A. No, I went over to this Mrs. Smith's.

Q. Yes?

A. I went over to her house a couple of times and I met her. Patsy was there when I went over there, and I talked to her there.

Q. And did she solicit you to go to work for her?

A. Yes, and one night I was at my apartment and she came by my apartment and asked me if I would go over.

Q. Did you go over to her house then?

A. Yes.

Q. Did you do anything like answering the door, or anything like that for her while you were not able to practice prostitution? A. Yes.

Q. And did she work herself out there? [159]

A. Yes.

Q. And did she have some other girls working for her?

A. She had a couple of girls that would bring their own dates in.

Q. What do you mean by "bring their own dates"?

A. Well, catch the customer on the street and bring him in to use the room.

Q. Would they pay her for that?

A. For the room, yes.

Q. Now, did you ever see her give Sam Blassingame any money? A. No.

(Testimony of Mary Donna Songahid.)

Q. Did you ever have any conversation with her about going to Portland or what you had done in Portland, or anything of that sort?

A. No. I believe I had told her I had been to Portland, and was planning on going back.

Q. You did tell her that? A. Yes.

Q. Did you tell her you and Sam Blassingame had gone to Portland together? A. No.

Q. Had you, in fact, gone together?

A. No. [160]

Q. Did you go by yourself? A. Yes.

Q. Who bought your ticket when you went to Portland? A. I bought it.

Q. Who furnished the money for it?

A. I did.

Q. By the way, I don't want to embarrass you, but you said you are a professional prostitute, is that right?

A. Well, you mean have I gone to bed for money? Yes, I guess I am.

Q. I mean, you do that regularly, don't you? Is that how you earn your living? A. Yes.

Q. "Turn tricks" for your money, is that what you say? A. Yes.

Q. Have you practiced prostitution any place other than Seattle and Portland? A. Yes.

Q. Where?

A. California and Montana and Wyoming and Nevada and Idaho and South Dakota.

Q. Various states, is that right? [161]

A. Yes.

(Testimony of Mary Donna Songahid.)

Q. And did you go from state to state by yourself? A. Yes.

Q. Did Sam take you from state to state when you went?

A. Mr. Blassingame has never taken me anywhere.

Q. I mean to say, you have always gone by yourself, isn't that right? A. Yes.

Q. Did you ever operate a house of prostitution of your own? A. Yes.

Q. Where? A. Rawlins, Wyoming.

Q. Did you have girls working for you there?

A. Yes.

Q. And did you work yourself? A. Yes.

Q. Now, on the fifth day of January, 1953, when you returned from Portland to Seattle, I asked you whether you would have returned from Portland to Seattle if it were not for the fact you wanted to get some narcotics?

Mr. Harris: I object for the reason I don't think the question is proper in its present form, your Honor.

The Court: In what respect? [162]

Mr. Harris: It started out—may I have it read back, please?

The Court: Mr. Reporter, read the question, please.

(Whereupon, the preceding question was read by the reporter.)

The Court: Do you understand the question as put to you?

(Testimony of Mary Donna Songahid.)

The Witness: Yes.

Mr. Harris: All right.

Mr. Kosher: You can answer it.

A. The only reason that I came back to Seattle was that I couldn't make any connection to get any narcotics in Portland, and I came back to get some narcotics, and to get my clothes, and I was going to Portland.

Q. (By Mr. Kosher): Did you have a job to go to in Portland? A. Yes.

Q. Did you have any conversation with the McCandless girl about Sam Blassingame at all? Did you ever talk about Sam Blassingame with the McCandless girl?

A. Yes, I have talked to her about him.

Q. And when was that, do you remember?

A. Over at the house on 22d.

Q. And was that after you moved into the [163] house? A. Yes.

Q. And what were those conversation about?

A. She told me that she liked Sam and I told her that Sam was married and had three children, a married man and had three children to support and——

Q. (Interposing): Did she say anything about him at all, other than that?

A. Well, she has made the remarks that if he didn't divorce his wife, that she was going to send him to the penitentiary.

Q. Now, do you know the gentleman sitting

(Testimony of Mary Donna Songahid.)

there in the front row, Mr. Bush, I believe, from the Federal Bureau of Investigation?

A. Yes.

Q. Did you ever have any conversations with him in the City Jail in Seattle? A. Yes.

Q. And did you tell him that Sam Blassingame had taken you in an automobile from a certain address to your apartment?

A. No, I told Mr. Bush that Sam Blassingame and I had taken a cab from the Airport to my apartment, that I believed Mr. Blassingame's car was in a garage, or something, because he wasn't using his car. I didn't see him drive his car for a couple of months. **[164]**

Q. And how many times did Mr. Bush talk to you at the City Jail?

A. He talked to me twice at the City Jail, and two or three times at the County Jail.

Q. Did you ever have any conversations with him about——

Mr. Kosher: Well, strike that.

Q. (By Mr. Kosher, continuing): Now, at the time he talked to you, were you under the influence of narcotics?

A. The first time he talked to me—the first two times I was going through the withdrawal. In other words, I was sick. I hadn't had any narcotics.

Q. And what about the last time?

A. No, the last time he talked to me was the 14th of January.

(Testimony of Mary Donna Songahid.)

Q. Now, you are not using any narcotics now, are you? A. No.

Q. And you haven't used any for how long, now?

A. Since August.

Q. Since August? A. Yes.

Mr. Kosher: You may inquire.

Mr. Prim: Just one question. [165]

Redirect Examination

By Mr. Prim:

Q. You did write a book while you were in the City Jail, is that right? A. Yes.

Q. County Jail? A. Yes.

Q. And you submitted that to the University of Washington Journalistic Department?

A. Yes.

Q. And you are now trying to go straight, is that right? A. Yes.

Q. And if you can get some money out of that, your livelihood is such that you don't even need to practice prostitution, is that correct?

A. That is right.

Mr. Kosher: May I ask one more question?

Recross-Examination

By Mr. Kosher:

Q. Are you married, by the way?

A. Yes, I am.

Q. And do you have a child? A. Yes.

Q. Where is the child? [166]

(Testimony of Mary Donna Songahid.)

A. Portland.

Mr. Kosher: That is all.

Cross-Examination

By Mr. Harris:

Q. When you went to Portland, did you go to see your child?

A. The baby wasn't in Portland then.

Q. How old is the child? A. Two years.

Q. Who is your child staying with now?

A. Some friends of mine.

Q. What are their names?

A. Do I have to answer?

Mr. Kosher: I object to that on the grounds it is immaterial.

The Court: I don't see the materiality.

Mr. Harris: They brought it out.

The Court: Do you question the child's existence?

Mr. Harris: I might. I would like to search that portion of the testimony.

The Court: Solely for the purpose of credibility?

Mr. Harris: That is the only purpose, your Honor.

The Court: You heard the question?

The Witness: Yes.

A. (Continuing): Mr. and Mrs. Portman. [167]

Q. Mr. and Mrs. Portman? A. Portman.

Q. P-o-r-t-m-a-n? (Spelling.) A. Yes.

Q. Do you know their first name?

(Testimony of Mary Donna Songahid.)

A. Jack, Mr. and Mrs. Jack Portman.

Q. Do you know the address?

A. 216 Northeast Wasco.

Q. Boston?

A. Wasco, W-a-s-c-o (spelling).

Q. And where is your husband?

A. I believe he is in Seattle.

Q. And what is his name?

A. Marcos Songahid.

Q. Marcos, M-a-r—(spelling)?

A. (Interposing): ——c-o-s (spelling).

Q. (Continuing): c-o-s. And when were you married to him?

A. October 5, October 15, 1952.

Q. And where? A. Here in Seattle.

Q. Counsel asked you if you had brushes with the law for prostitution and dope, and I believe you answered, "Yes"? A. Yes. [168]

Q. And they continued for the last five or six years? A. Yes.

Q. How many times would you say that you had brushes with the law for the last five or six years?

A. I believe I have been arrested twice for prostitution.

Q. Is that all? A. Yes.

Q. Have you been arrested for anything else?

A. Narcotics.

Q. How many times for narcotics?

A. Four or five times.

Q. Anything else?

(Testimony of Mary Donna Songahid.)

A. I have been arrested for disorderly person, but that has been stricken.

Q. Well, was that a brush with the law, so far as you were concerned? A. I was arrested.

Q. All right. How many times?

A. For disorderly person?

Q. Yes. A. Once.

Q. Anything else?

A. That is all that I can think of. [169]

Q. Is it your testimony then that you had approximately seven brushes with the law in the past five or six years? A. Yes.

Q. Have you had any other brushes with the law? A. Not that I know of.

Q. Did you have a brush with the law in 1944 at Grand Junction, Colorado?

A. I was a juvenile at that time.

Q. Well, did you have a brush with the law at that time?

A. I believe so. I am not sure of the date, but I think it was then.

Q. January 15, 1944?

A. I am not sure of the date, I said.

Q. All right. Did you have a brush with the law on September 24, 1944, at Pocatello, Idaho?

A. Yes.

Q. Did you have a brush with the law on November 4, 1945, at Ely, Nevada?

A. Ely, Nevada?

Q. Or Ely, E-l-y (spelling)? A. Ely, yes.

Q. How old are you, Mrs. Songahid?

(Testimony of Mary Donna Songahid.)

A. Twenty-four. [170]

Q. Twenty-four; did you have a brush with the law on November 28, 1945, at Salt Lake?

A. Yes.

Q. On November 25th, 1946, in San Francisco, California? A. Yes.

Q. On December 15, 1946, at San Francisco, California?

A. Yes. I am not sure about these dates. I am just answering because I recall the times I was arrested, but I am not sure if those are exact dates.

Q. All right. In San Francisco, January 13, 1947? A. Yes.

Q. On March 11, 1947, in San Francisco, California? A. Yes.

Q. On November 11, 1947, at Susanville, California?

A. No, I have never been arrested at Susanville, California.

The Court: Is that the same date?

Mr. Harris: No, your Honor.

Q. (By Mr. Harris): Did you say March 11th?

Mr. Harris: The other was March 11th, and this is November 11th.

The Witness: May I say something, your [171] Honor?

The Court: You may.

The Witness: A lot of these arrests he is reading off is where I have gone to work as a prostitute, and in order to work you have to go to the Police Station and be fingerprinted and mugged and I be-

(Testimony of Mary Donna Songahid.)

lieve they put it down as arrest for prostitution, but I haven't been arrested.

Q. (By Mr. Harris): When you go to the Police Department to be fingerprinted and mugged, they arrest you?

A. They don't arrest you. They take your fingerprints and picture, and I believe they put it as "arrest for prostitution."

Q. You believe they put it as arrest for prostitution? What leads you to believe that?

A. They must put it down as something, you have the dates there.

Q. They don't put it down as believed you were arrested? A. Well, I wasn't arrested.

Q. You were not arrested on those dates?

A. Not on those dates you are talking about.

Q. All right. Which one of the dates then while you were in San Francisco were you not [172] arrested?

A. I was arrested in San Francisco.

Q. On all of the dates I mentioned?

A. I think so.

Q. I mentioned four.

A. I think I was, I am not sure.

Q. All right, at Ely, Nevada, were you arrested there? A. No, I was not.

Q. You were not arrested for investigation on a vagrancy charge? A. No.

Q. And the case dismissed? A. No.

Q. And you say you have never been to Susanville?

(Testimony of Mary Donna Songahid.)

A. Yes, I have been there, but I wasn't arrested there.

Q. You were not arrested on November 11, 1947, for prostitution and subsequently released?

A. No.

Q. At Sacramento, California, on September 13. 1947?

A. Yes, I was arrested in Sacramento.

Q. Arrested there? A. Yes.

Q. Back then to San Francisco, November—excuse [173] me, April 26, 1948? April 26, 1948, San Francisco?

A. I am not sure. I imagine I was.

Q. At Rawlins, Wyoming, September 9, 1948?

A. Yes, I was arrested once in Rawlins.

Q. At Billings, Montana, May 27, 1949?

A. Yes.

Q. Seattle, Washington, October 1, 1949?

A. Yes.

Q. Seattle, Washington, February 25, 1950?

A. Yes.

Q. Seattle, Washington, May 2d, 1950?

Mr. Prim: May it please the Court, I would like to know whether or not those are arrests or convictions?

Mr. Harris: I would be happy to go back.

The Court: The question is, whether they were arrests.

Mr. Harris: Yes, your Honor. If Counsel wishes convictions, I will go back through them, back——

(Testimony of Mary Donna Songahid.)

Q. (By Mr. Harris): Back in 1944, were you convicted?

The Court: I will advise the Jury at this time that the testimony is received solely as to credibility and has nothing to do whatsoever with the guilt of the defendant with regard to this crime charged.

A. In 1944, I had gone away from a reform school, [174] and they arrested me and took me back to the reform school.

Q. Were you convicted?

A. I don't know what you mean by "convicted."

The Court: Was that a juvenile charge?

Mr. Harris: Yes, your Honor.

The Court: Was that a conviction on a juvenile charge?

Mr. Harris: It shows a fine of fifteen dollars.

The Witness: It couldn't be. I didn't go before a Judge, or anything. They held me and took me back to school.

The Court: The juvenile charges, I think, should be passed.

Mr. Harris: All right, your Honor.

Q. (By Mr. Harris): And at Sacramento——

Mr. Kosher: Of course, she is not my client, but if he is bringing this in for impeachment, all he needs to ask her is whether or not she has been convicted of a crime. Then all these other things on the arrests are improper.

The Court: She admitted three or four, and said that is all she recalled, and I think his bringing

(Testimony of Mary Donna Songahid.)

them out [175] is proper in view of her preliminary statement.

You may proceed.

Mr. Harris: Thank you, your Honor.

Q. (By Mr. Harris): On September——

Mr. Harris: Excuse me.

Q. (By Mr. Harris): August 13, 1947, Sacramento, California, were you convicted?

A. Yes.

Q. At Seattle, Washington, February 25, 1950, were you convicted?

A. I don't recall. If you could tell me what the charge was?

Q. Disorderly conduct, prostitution, and you were fined $100 and given 30 days in jail, suspended? A. I guess I was convicted.

Q. On May 2d, 1950, disorderly conduct, prostitution, and fined $100 and given thirty days suspended; were you convicted? A. Yes.

Q. At Seattle, Washington, May 3, the following day, vagrancy charge, were you convicted and given three weeks? A. Yes. [176]

Q. Seattle, Washington, November 1, 1950, habitual user of narcotics, convicted and given six months? A. Yes.

Q. Seattle, Washington, February 10, 1951, and it says revoked your parole for use of narcotics?

Mr. Prim: I object to that, your Honor. It is not a conviction.

Mr. Harris: I will not ask if it is a conviction.

(Testimony of Mary Donna Songahid.)

Q. (By Mr. Harris): Was that a brush with the law?

The Court: Objection sustained. I don't think, Mr. Harris, there is any need to try this defendant on a lot of past offenses. She has admitted these convictions and it can have nothing but a prejudicial effect and I think we should leave it.

Mr. Harris: All right, your Honor.

Q. (By Mr. Harris): When did you first meet Mr. Blassingame?

A. I believe it was either 1949, or the first of 1950. His wife introduced him to me.

Q. And where was that?

A. She was working at the Rocking Chair.

Q. Where is that located?

A. On 14th and Yesler.

Q. Here in Seattle? [177] A. Yes.

Q. Now, did you see him during the year 1952?

A. Yes.

Q. Occasionally, or rather often?

A. Well, I was ill during 1952 when Mrs. Blassingame took me in and took care of me.

Q. You lived at his home with his wife?

A. Yes.

Q. During 1952? A. Yes.

Q. When did you start living there?

A. I can't tell you the exact date.

Q. How long did you live there?

A. I lived there two weeks at one time, and I stayed there about one month another time.

Q. When did you leave there?

(Testimony of Mary Donna Songahid.)

A. I couldn't tell you the exact date.

Q. Well, approximately?

A. In October or November.

Q. Of 1952? A. Yes.

Q. Where did you go then?

A. And then I rented an apartment.

Q. Where? A. 30th and Spruce. [178]

Q. What was the address?

A. 3009½ East Spruce.

Q. Under what name did you rent that apartment?

A. I didn't rent it under my name. I got it from another fellow that—there was a fellow, and he was giving it up, so I paid him the rent on it.

Q. What was his name?

A. I believe it is Howard Taylor. I am not sure.

Q. Howard Taylor? A. Yes.

Q. Do you know a person by the name of Freddie Johnson?

Mr. Prim: I don't see the materiality in this, your Honor. I object to it.

A. I don't recall the name.

Mr. Prim: Just a moment.

The Court: I don't know the purpose of it. It would appear to be immaterial. I don't know what the purpose of it is. I assume it is for impeachment. If the Government assures the Court it is for that purpose, and can establish the fact, the Court will overrule the objection.

Mr. Prim: May I say one word, your Honor? She has never said on direct examination with whom

(Testimony of Mary Donna Songahid.)

she lived at this particular place. She never said anything like [179] that. These facts have nothing to do with her going to Portland, or with her being associated with this man. My idea of impeachment is when a person makes a fact—states a fact, and you are trying to prove that the fact is not true. She never said anything about that.

The Court: You may be right, Mr. Prim. I assume Mr. Harris knows that, and on cross-examination the Court is not going into the purpose of all questions.

If it is improperly a matter of impeachment, the Court will have to advise the United States Attorney that he is improperly asking questions.

Mr. Harris: The only purpose of it, your Honor, is this:

First of all, she said when they returned from Portland, Blassingame and her went to her apartment at 3009½ East Spruce Street. If it is her apartment, I think I am entitled to inquire whether or not she rented that apartment, if she did, and if she didn't, on whose permission she was staying there.

The Witness: I just told you——

Mr. Prim: If it please the Court, she told him a man by the name of Thomas and now he is asking if she knows somebody else. She said, as I remember her testimony, it was that she came from Boeing Field to that apartment, and she got out. I can't see under what [180] stretch of the imagination this

(Testimony of Mary Donna Songahid.)

other person, after she told him from whom she rented the place——

The Court (Interposing): It appears to be immaterial, as I indicated. I, likewise, will not rule it out if it can be properly established as a proper question in connection with impeachment. That is as far as the Court can go. I will sustain the objection, unless the Government assures me that it is properly within the scope of impeachment.

Mr. Harris: All right, your Honor. I might say this: That the Government has information—counsel mentioned Thompson. I thought the witness said Howard Taylor.

The Witness: I did.

Mr. Harris: The Government has information that a Freddie Johnson rented that apartment at the time, and that is the only purpose for asking the question at this time.

The Court: That may be proper.

Mr. Harris: Yes.

The Court: Yes.

Now, what is the question now?

Mr. Harris: I asked her if she knew a Freddie Johnson.

The Court: Objection overruled. [181]

A. I don't know anyone by that name. I might know him if I saw him.

Q. (By Mr. Harris): But you rented the apartment from Howard Taylor? A. Yes.

Q. Were you living there on December 31, 1952?

A. Yes.

(Testimony of Mary Donna Songahid.)

Q. Does that apartment have a number?

A. I am not sure. I believe it has a number on it, but I don't remember now the number.

Q. You just know where it is in the building?

A. Yes.

Q. Now, prior to December 31, 1952, did you know Beulah Smith? A. No.

Q. You never knew her? A. No.

Q. When did you first meet Beulah Smith?

A. The night I got out of jail. I think it was the ninth of January, 1953.

Q. That is the first time? A. Yes.

Q. And did you go to her house alone or with someone? A. When are you talking about?

Q. The first time you met her. [182]

A. I didn't meet her at her house.

Q. All right, where did you meet her the first time? A. At 22d and Denny Way.

Q. What is that?

A. An apartment house there. I don't know the number of the apartment house. It is on 22d, next to East Denny Way.

Q. Who did you go with at that time?

A. I didn't go with anyone. To visit some friends of mine.

Q. By yourself? A. Yes.

Q. And who lived there; who were the friends?

A. Don Jordan and Betty Clifford.

Q. And Beulah Smith was there?

A. Yes, she came there after I was there.

Q. And did you, after that, go to her house?

(Testimony of Mary Donna Songahid.)

A. Yes.

Q. And when you went there, did you go alone or with someone?

A. Well, I have been there several times. I have gone alone, and with someone.

Q. You have gone alone? A. Yes. [183]

Q. And seen her there when you went there alone? A. Yes.

Q. And you heard her testimony that the only time she saw you at her house is when you were with Sam Blassingame?

A. Yes, I heard her.

Q. And that is not correct, is that right?

A. Yes.

Q. When you went there with someone, with whom did you go?

A. I have gone there with different people, and I have gone there with Mrs. Blassingame.

Q. How many times?

A. Two times that I know of.

Q. These were all after January 9, 1953?

A. Yes.

Q. After you had gone to Portland?

A. Yes.

Q. Did you ever—did you ever tell her you were going to Portland? A. No.

Q. Were you present when she asked Sam if she could go to Portland with you, too?

A. No; the first I knew of it was when she said it yesterday, on the stand. [184]

Q. Did you ever tell her that you hustled?

(Testimony of Mary Donna Songahid.)

A. No, but I think she knew that I did.

The Court: The Court is going to interrupt now to take a recess. Ladies and Gentlemen of the Jury:

The Court at this time calls your attention to the admonition given earlier. You are not to confer among yourselves, or with anyone regarding any of the matters relating to the merits of this case, and you are not to form or express an opinion in regard thereto, until the case is finally submitted to you for your verdict.

You may now be excused, and the Court will remain in session until you leave.

(Whereupon, the Jury retired from the courtroom.)

(Whereupon, at 11:04 o'clock a.m., January 22, 1954, a recess was had until 11:19 o'clock a.m., January 22, 1954, at which time counsel and defendants, heretofore noted, being present the following proceedings were had, to wit:)

The Court: You may call the Jury.

(Whereupon, the Jury was returned to the courtroom.)

The Court: You may be seated. It is stipulated that the Jury and the Defendants are present in the courtroom?

Mr. Kosher: Yes, your Honor. [185]

Mr. Harris: Yes, your Honor.

The Court: The Defendant will take the stand.

Q. (By Mr. Harris): Mrs. Songahid, have you

(Testimony of Mary Donna Songahid.)

been know by any other name other than Pat Lewis or Patricia Lewis? A. Yes.

Q. What other name?

A. My real name, and Betty Reed.

Q. What is your real name?

A. Mary Donna Songahid.

Q. That is your married name? A. Yes.

Q. Any others?

A. Sally Maun, M-a-u-n (spelling).

Q. Any others? A. Betty Reed.

Q. Any others? A. Frankie Maun.

Q. Pardon? A. Frances.

Q. Any others? A. My real name.

Q. Any others? A. I believe that is all.

Q. When you went to Portland, you say you went by [186] airplane, is that correct?

A. Yes.

Q. What Air Line? A. Western.

Q. Western? A. I think it is Western.

Q. Or West Coast?

A. I left from the Boeing Airport.

Q. Yes?

A. I think it is Western, or West Coast.

Q. And what name did you use then?

A. Betty Reed.

Q. When you arrived at Portland, you say you registered at the Chamberlin Hotel?

A. Under "Betty Reed."

Q. Now, you say you kept that room until January 5, 1953? A. Yes.

Q. Did you stay in the room from December 31,

(Testimony of Mary Donna Songahid.)

1952, to January 5, 1953? A. No.

Q. How many evenings or days did you spend?

A. I believe I stayed there three nights. I won't say for sure, because I am not sure.

Q. And where did you stay the other time? [187]

A. I stayed at a friend of mine's house.

Q. And what was the name of the friend?

A. Alvina Neuman.

Q. Is she known by any other name, if you know?

A. I think her nickname is Little Bit.

Q. Little Bit? A. Yes.

Q. Now, was anyone else there at that time?

A. Her husband.

Q. What is his name?

A. Madison Wilson.

Q. Madison Wilson? A. Yes.

Q. Is he known by any other name, or nickname?

A. That is all I know him by, Mac.

Q. Pardon? A. Mac.

Q. Mac? A. Yes.

Q. Do you know the address?

A. No, I don't; I don't remember it.

Q. Would you know it if you heard it?

A. I am not sure.

Q. Is 307 Northeast Fargo, Portland, Oregon—does that sound familiar? [188]

A. I am not sure that is it, or not. I won't say, because I am not sure.

(Testimony of Mary Donna Songahid.)

Q. Now, did Sam Blassingame come to that address? A. I didn't see him.

Q. Well, you didn't see him? A. No.

Q. Do you know whether he came there or not?

A. I heard that he was there.

Q. You heard he was there? A. Yes.

The Court: When you speak of "address" now, you are speaking of what address?

Mr. Harris: Well, she is not able to identify the address, but I believe it is Alvina's home.

Q. (By Mr. Harris): Is that right?

A. Yes.

Q. And Madison Wilson's home?

A. Yes.

Q. And that Sam Blassingame had been there; you heard that?

Mr. Kosher: Just a minute. I object because it calls for a hearsay answer, and I move that the last question and answer be stricken, and the Jury instructed to disregard it. [189]

The Court: The answer was made, and no objection was made at the time, and the Court will let the answer stand, and will sustain objection to the last question.

Q. (By Mr. Harris): Did you leave Madison Wilson's or Alvina Neuman's home by taxicab for the Portland Airport together? A. No.

Q. You say you did not? A. No.

Q. Now, what was your purpose for going to Portland? A. I went there to work.

Q. Was that the only purpose? A. Yes.

(Testimony of Mary Donna Songahid.)

Q. What was Sam Blassingame's purpose for going to Portland? A. I don't know.

Mr. Kosher: I object to that, because it calls for a hearsay answer.

The Court: Objection sustained.

Mr. Harris: Not if Sam Blassingame told her.

Mr. Kosher: That wasn't the question.

Q. (By Mr. Harris): Did Sam Blassingame tell you why he went to [190] Portland? A. No.

Q. You don't know why he went to Portland, is that right?

A. Only what I have heard through other people.

Mr. Kosher: Just a minute. I object to that on the grounds it is hearsay.

Q. (By Mr. Harris): Did you testify on direct examination that Sam Blassingame went to Portland on a car deal? A. No, I didn't.

Q. You didn't testify to that? A. No.

Q. And Sam Blassingame never told you why he went to Portland?

A. He didn't tell me, no.

Mr. Harris: Excuse me, just a moment, your Honor.

(Whereupon, there was a brief pause.)

Q. (By Mr. Harris): Now, you say that after you arrived here—excuse me—who bought the tickets in Portland under the name of Mr. and Mrs. Blassingame?

A. I gave Sam the money for my ticket, and he purchased the tickets. [191]

(Testimony of Mary Donna Songahid.)

Q. Do you recall the testimony of Mr. Caughey?

A. Yes.

Q. Do you recall that he testified that you bought the tickets? A. Yes, I do.

Q. Now, after you arrived——

Mr. Prim: Just a moment, your Honor. That was a wrong statement, altogether. As I remember, the Agent said a woman bought the tickets.

The Court: The question was whether she heard him say that.

The Witness: He said he couldn't identify the woman that purchased the tickets.

Q. (By Mr. Harris): That is right, but——

A. (Interposing): But it wasn't—but Sam bought the tickets.

The Court: Just a moment. There is no need for you to explain what the other testimony is. If you have a question, you may put it, and then you answer the questions as counsel puts them to you.

The Witness: O.K.

Q. (By Mr. Harris): Do you recall the testimony of Mr. Bush? A. Yes. [192]

Mr. Kosher: I object to that on the grounds it is immaterial whether she recalls the testimony of anyone.

The Court: Objection overruled.

Q. (By Mr. Harris): Do you recall that he testified that the conversation he had with you on January 6, 1953, in the City Jail—that you told him that you left the Seattle-Tacoma Airport to-

(Testimony of Mary Donna Songahid.)

gether in a taxicab with Sam Blassingame; do you recall that? A. Yes.

Q. And do you recall further his testimony that the two of you went to an address near Jackson Street, where Sam Blassingame got his personal automobile; do you recall his testimony?

A. I recall him testifying to that, yes.

Q. And do you recall his testimony that Sam Blassingame drove you from, in his own car, to 3009½ East Spruce Street, where you got out?

A. Yes.

Q. Now, when you were arrested and taken to the City Jail on January 6, 1953, by Officers Scott and Francis——

Mr. Harris: May I have Plaintiff's Exhibits 1 and 2?

(Whereupon, exhibits were handed to Mr. Harris by [193] the Clerk.)

Q. (By Mr. Harris): ——is it your testimony that Plaintiff's Exhibits 1 and 2 were in your pocket at that time? A. Yes.

Q. And that Sergeant Scott pulled them out of your pocket? A. Yes.

Q. And that you reached over and grabbed them back from him? A. That is right.

Q. And in doing that you accidentally tore the tickets? A. I tore the tickets.

Q. Accidentally? A. No, I tore them.

Q. On purpose? A. Yes.

Q. Purposely trying to get the name Mr. Blas-

(Testimony of Mary Donna Songahid.)

singame off of one ticket, and Mrs. Blassingame off of the other? A. Not——

Mr. Prim: Just a moment. The thing itself speaks for itself, how it was torn, your Honor. We object to it.

The Court: Objection overruled. [194]

Will the Reporter read the question?

(Whereupon, preceding question was read by the Reporter.)

Q. (By Mr. Harris): Have you completed your answer, Mrs. Songahid?

A. No. Mr. Scott had made me angry when he took the tickets out of my pocket, and I grabbed them back and tore them.

Q. Why did you tear them?

A. I don't know. He made me angry.

Q. And why did you just tear the name Mr. Blassingame off of one ticket, and Mrs. Blassingame off of the other?

A. Well, I grabbed the tickets, and I tore them.

Q. Accidentally?

A. I don't know if you call it "accidentally," or not. I meant to tear them. That is what I am testifying to.

Q. Did you mean to tear the whole ticket in half, or just the names off of them?

A. I meant to tear the tickets.

Q. The whole tickets?

A. The tickets. I didn't care. I was mad, and I wanted to tear the tickets.

(Testimony of Mary Donna Songahid.)

Q. And it was just by chance you tore the ticket at the place where "Mrs. Blassingame" was written on it? [195]

A. I believe that is where I grabbed ahold of it.

Q. And "Mr. Blassingame" on the other, is that correct?

A. That is where I grabbed ahold of them, and it tore.

Q. Well, my question was, it was just by chance that you tore both tickets where the names were?

A. I think it was by chance that they got torn like that, but if I got ahold of them, I would have tore the names off of them.

Q. Who tore the names off of them?

A. I did, when I grabbed the tickets.

Q. And when you grabbed the tickets, was it done accidentally, or on purpose?

Mr. Kosher: I object on the grounds it is repetitious.

The Court: Objection sustained.

Mr. Kosher: He asked the question three or four times now.

The Court: I sustained the objection.

Mr. Harris: All right, your Honor.

Q. Do you know who rented the house at 724-22d Avenue South?

A. No. This Patsy told me it was her [196] place.

Q. Do you know who rented the house at 724-22d Avenue South? A. No, I don't.

Q. Do you know who paid the rent there?

(Testimony of Mary Donna Songahid.)

A. No, I don't.

Q. Were you living there?

A. I did live there, yes.

Q. Did you ever make the statement to Sam Blassingame in the presence of Mrs. McCandless that "I," referring to yourself, "make more money in one night than she * * *," referring to McCandless, "makes in a week"? A. No.

Q. You never made that statement?

A. No.

Q. Did you ever give Mr. Blassingame any money during the time that you were living at 724-22d Avenue South? A. No.

Q. Do you recall Mrs. McCandless' testimony that she saw you hand him some money at one time while you were there? A. Yes.

Q. Is that correct?

A. I don't believe she has ever seen me hand him any money. [197]

Q. Well, have you handed him any money?

A. Yes, I gave him fifteen dollars that I owed him.

Q. When? While you were living at 724-22d Avenue South? A. Yes.

Q. How long after you were living there?

A. I don't recall how long.

Q. One month, or one week, or what?

A. A week or so, I believe.

Q. A week or so after you were living there?

A. I am not sure how long it was.

Q. You gave him about fifteen dollars?

(Testimony of Mary Donna Songahid.)

A. Yes.

Q. You were ill, weren't you, while you were living at 724-22d Avenue South? A. Yes.

Q. Where were you working?

A. I wasn't working then.

Q. Were you working as a prostitute at that time?

A. I wasn't working at all, at that time.

Q. How were you able to get your money?

A. I got that from my husband.

Q. Mr. Songahid? A. Yes.

Q. And did he know where you were [198] living? A. I don't believe he did, no.

Q. And you paid back Mr. Blassingame then the money you received from Mr. Songahid, is that right?

A. Yes. You see, I had borrowed from Mr. and Mrs. Blassingame to go to the Doctor.

Q. And that is where you got your money to pay him back? A. Yes.

Q. Now, is it your testimony, too, that it was Mrs. McCandless who, you might say, solicited you to go there and work as a prostitute?

A. She asked me to, yes.

Q. Did you ever work there as a prostitute?

A. No, I never took any dates there. I was sick during the time I was there.

Q. So that she let you live there all of this time, even though she had solicited you to work as a prostitute? A. I answered the door for her.

Q. That is all you did?

(Testimony of Mary Donna Songahid.)

A. That is all I did, and seated the people when they came in.

Q. Did she pay you anything for that?

A. No.

Q. You did that voluntarily, did you? [199]

A. Yes.

Q. Now, you say—said—the reason you returned from Portland was for the purpose of coming back to Seattle to get some narcotics, is that correct?

A. Yes.

Q. Did you get some narcotics?

Mr. Prim: I object to that, your Honor. Immaterial.

The Court: Objection sustained.

Q. (By Mr. Harris): And you said the reason for coming back from Portland to Seattle was not to work as a prostitute, isn't that correct?

A. Yes.

Q. And what time did you arrive here from Portland?

A. It was after dark. I don't know what time it was.

Q. How long was it before you were arrested?

A. Four or five hours, I believe.

Q. Had you turned any tricks, or acted as a prostitute during that period of time?

A. Well, some fellows came up to the apartment, and I didn't see any reason to turn them away, so I had a date with them, yes.

Q. You were not sick then, were you? [200]

(Testimony of Mary Donna Songahid.)

A. No, not then. I was when I came out of jail.

Q. So, the first thing you did when you came back from Portland to Seattle was to work as a prostitute?

A. They were steady customers of mine, and they came by my house, my apartment. Otherwise, I wouldn't have seen them if they hadn't come by there. I wasn't out soliciting them.

Q. These steady customers, were they soldiers?

A. One civilian.

Q. Well, were any of the steady customers soldiers?

A. The civilian was. The other two fellows were his friends.

Q. Were they soldiers? A. Yes.

Q. They were not steady customers?

A. No, the civilian was. The soldiers were his friends.

(Whereupon, there was a brief pause.)

Mr. Harris: Excuse me, just a moment, your Honor.

(Whereupon, there was a brief pause.)

Q. (By Mr. Harris): You say you have used no narcotics since August, 1953, is that correct?

A. Yes.

Q. Why? [201]

Mr. Prim: We object to that as immaterial.

The Court: Objection sustained.

Q. (By Mr. Harris): When was the last time you have seen your child?

(Testimony of Mary Donna Songahid.)

Mr. Kosher: I object to that on the grounds it is immaterial.

The Court: Objection sustained.

(Whereupon, there was a brief pause.)

Mr. Harris: Excuse me just a moment, your Honor.

(Whereupon, there was a brief pause.)

Mr. Harris: I think that is all.

Recross-Examination

By Mr. Kosher:

Q. Now, Counsel asked you and referred to the testimony of Mr. Bush with reference to your having told him that Sam stopped and got his car and took you to your apartment?

A. Mr. Bush must be mistaken.

The Court: The question was——

Q. (By Mr. Kosher): You heard that, didn't you? A. Yes.

Q. Was that true? A. No.

Q. Did you ever tell him that? [202]

A. No.

Q. Now, as far as the house that you went to live in that you claim was operated by Mrs. McCandless, is that customary in a house of prostitution, to have somebody answer the door?

Mr. Harris: I will object to that, your Honor.

The Court: Objection sustained.

(Testimony of Mary Donna Songahid.)

Mr. Kosher: If your Honor pleases, he has gone into this.

The Court: Well, the question—it wasn't objected to, and the Court might have sustained an objection, if made. That doesn't necessarily mean that the Court will permit further immaterial matter. Objection sustained.

Q. (By Mr. Kosher): Now, at the time Sergeant Scott arrested you, he did find some narcotics in the apartment, didn't he? A. Yes.

Mr. Kosher: I think that is all.

Redirect Examination

By Mr. Prim:

Q. Now, Pat, about the same time that you paid Mr. Blassingame, you also paid me, and you paid the bondsman, isn't that correct?

A. Yes. [203]

Q. Out of the same money your husband gave you, isn't that correct? A. Yes.

Q. He gave you quite a bit of money, isn't that correct? A. Yes.

Q. Near one thousand dollars, isn't that correct?

A. Yes.

Q. You are now separated from your husband, isn't that right? A. Yes.

Q. Now, a great many of these charges and convictions were during the time that you were a minor, isn't that correct? A. Yes.

Q. And you have told to the Jury the truth about

(Testimony of Mary Donna Songahid.)

the transaction that you had in Portland and the transaction that you had with Mr. Blassingame?

A. Yes.

Mr. Prim: That is all.

Mr. Kosher: Could I ask one more question, please?

Re-Recross-Examination

By Mr. Kosher:

Q. You told Mr. Harris that some of these arrests [204] he talked to you about were not actually arrests, but that you had reported to certain Police Stations in towns where you went to work as a prostitute, is that right? A. Yes.

Q. And is that customary?

Mr. Harris: I object to that, your Honor.

The Court: Objection sustained.

Mr. Kosher: That is all.

Mr. Prim: That is all.

Re-Recross-Examination

By Mr. Harris:

Q. When did you reach the age of 21?

A. Three years ago. I was born December 23, 1929.

Q. So that, on December 23, 1951, you would then be—— A. (Interposing): Yes, 1950.

Q. Would it be 1950?

A. Well, I will be 25.

The Court: When was your birth date?

(Testimony of Mary Donna Songahid.)

The Witness: December 23, 1929.

The Court: That is the only thing that is material. I suppose she was 21, 21 years later.

Mr. Harris: Yes, your Honor. That would be 1951, wouldn't it?

The Court: The Jury, I think, can add, Mr. [205] Harris.

Q. (By Mr. Harris): The last conviction I asked you about was November 1, 1950. You were still a minor then? A. Not if I was 21.

Q. This is November 1, 1950.

Mr. Kosher: Just a minute. I object to this as immaterial.

The Court: Objection sustained.

Mr. Harris: That is all.

Mr. Kosher: That is all.

Mr. Prim: That is all.

(Witness Excused.)

Mr. Kosher: The Defense rests.

We will renew our motions, if we may.

The Court: We may recess a little early, so that we may start earlier. Do we have anything else on?

Mr. Harris: Your Honor, there is one other matter not relative to this matter at all.

The Court: There is no objection at all?

Mr. Kosher: No.

Mr. Prim: No.

(Whereupon, Mr. Harris conferred with the Court at the Bench.)

The Court: How long do you want for argument, Mr. [206] Harris?

Mr. Harris: About twenty minutes, your Honor.

The Court: How much time do Counsel for Defendants think?

Mr. Kosher: 45 minutes apiece.

Mr. Harris: If that is the case, I would have to ask for more.

Mr. Prim: I don't think that we will talk that long, your Honor.

The Court: That is quite long. I don't ordinarily put a limitation on, but twenty to thirty minutes——

Mr. Kosher: That is all right. Thirty minutes will be fine. I probably won't use that much time. I don't like to be restricted, if I can help it.

The Court: I don't like to put a restriction on, but I think thirty minutes is ample for each side, and I trust you will not find it necessary to take that long. I don't mean each side, but each Defendant. I trust you will not need that much time when you get to make your argument.

Members of the Jury, we will recess now until 1:30. I wonder if we could have that other matter, if it comes up, on at a recess, Mr. Harris?

Mr. Harris: All right.

The Court: Or later this afternoon, say at [207] four o'clock?

Mr. Harris: It is agreeable with me. I will call the other attorney.

The Court: So, perhaps, then we can finish.

Mr. Harris: All right.

The Court: So, we will recess. Members of the Jury, until 1:45, and the Court again calls your attention to the admonition given heretofore not to discuss among yourselves or with anyone, or form any opinions regarding matters relating to the merits of this case, until the case is finally submitted to you for your verdict.

You may now be excused until 1:45. Excuse me, 1:30, and get here a little in advance so that we can start promptly.

(Whereupon, the Jury retired from the courtroom.)

The Court: It is stipulated that the Jury have left the courtroom?

Mr. Kosher: Yes, your Honor.

Mr. Harris: Yes, your Honor.

The Court: I gather, Mr. Kosher and Mr. Prim, you wish to renew your motions?

Mr. Kosher: Yes, your Honor. For the record, the Defendant, having rested, the Defendant Blassingame asks this Court to direct the Jury to return a verdict of [208] Not Guilty.

The Court: What you mean is a verdict of acquittal.

Mr. Kosher: On the grounds he isn't guilty of the crime charged, and it was impossible for him to commit the crime such as charged in the information according to the cases we have submitted heretofore, and now I would like to move to strike the testimony of the witness McCandless and the witness Smith on the ground that the testimony has

not been connected up in any way, as Counsel for the Government indicated it would be; that there is no showing in this case that the Defendant conspired, in any way, to transport or aided in the transportation of the Defendant——

The Court: Just a minute. Is this one of the Jurors?

The Bailiff: Yes.

The Court: We will wait a minute.

(Whereupon, there was a brief pause.)

Mr. Kosher: That there is no evidence in the record to show that the Defendant Blassingame conspired with or aided or abetted Patricia Lewis to leave Portland to go to Seattle for the purpose of prostitution.

I believe these motions were made at length at the conclusion of the Government's case. [209]

The Court: The Court will consider made a renewal of the motion made at the conclusion of the Government's case.

Mr. Kosher: Very well.

Mr. Prim: We ask that the Court instruct the Jury to bring in a verdict of acquittal, or that the Court take the case from the Jury altogether, for the reason that there is not sufficient facts here to constitute the crime charged. It has not been shown by the Government that there was a community of purpose, some common understanding, a meeting of the minds of any unlawful act whatsoever. For that reason, your Honor, we feel that there isn't sufficient facts here to warrant the crime charged, so

that they should be dismissed, or that the Jury should be instructed to bring in a verdict.

The Court: The Court will likewise consider your motion, Mr. Prim, as a renewal of the motion made at the conclusion of the Government's case, and the Court will reserve ruling on the motions until after the case has been submitted to the Jury.

As to the motion to strike the testimony of the witnesses McCandless and Smith, was it——

Mr. Kosher: Yes.

The Court (Continuing): ——the Court will deny the motion at this time. [210]

Mr. Kosher: Perhaps I should have been a little more specific for the benefit of the Court. I think so much of McCandless' testimony as referred to the Defendant Blassingame placing her in a house of prostitution and accepting her earnings and having conversation with her outside the hearing and outside the knowledge of Patricia Lewis should be stricken.

The Court: The Court at this time will not grant that motion on the ground the Court feels there is sufficient—it is the Court's opinion, at least at this time, sufficient to go to the Jury on the question of whether or not there may have been a conspiracy, and, if the Jury so finds, of course, the testimony then might be considered. The Court will consider an instruction relative to what that question might be on the limiting nature of it.

If you wish to submit it, or if you do not, the Court will submit an instruction of his own in that respect.

Mr. Kosher: I think your Honor gave one in the last case, and if we could have the same type of instruction. That was the Fitzgerald Case.

The Court: I can check it. I don't recall whether that type of instruction was given. I can check it. I think the instruction will be given somewhat as I gave it [211] to the Jury before orally that it will be used only if they find a conspiracy existed, and what it might be.

However, if you wish to submit something, fine. Otherwise, I will give an instruction along that line.

Mr. Kosher: That will be fine. I won't submit one, then.

The Court: As to the other requested instructions.

(Whereupon, requested instructions were discussed and colloquy had thereon by and between Court and the respective Counsel, and the following proceedings were then had, to wit:)

The Court: Is there anything further?

Mr. Prim: No, your Honor.

The Court: All right, then we will begin again immediately upon taking up after recess. [212]

* * *

The Court: I have read the briefs in this matter, Gentlemen.

Mr. Kosher: I don't see Mr. Prim here.

The Court: Have you, Mr. Kosher, heard from him?

Mr. Kosher: No, I could go and call him.

I might ask, first, do you wish to argue?

Mr. Kosher: Not unless the Court cares to hear from Counsel. We could give you the sequence of the cases. They are not too apparent in the briefs. We could give you the dates that the cases would have been decided, if that would be helpful to the Court.

Most Counsel, for the Government and the Defendants, have cited the same cases. I think Counsel for the Government cited one additional case, and before Court opened, I correlated them and we have the dates upon which these cases were decided, and that may be of some assistance to the Court.

The Court: Well, I would hear that.

I will ask—let's see, he represents Mrs. Songahid. Do you know if Mr. Prim is to be here?

Defendant Songahid: I haven't heard from him. I thought he was going to be.

The Court: I think we had better wait. [230]

Mr. Kosher: I will go and call him.

The Court: All right, we will proceed with the other matters.

(Whereupon, there was a brief recess in the within-entitled and numbered cause, and the following proceedings were had, to wit:)

The Court: I will hear from you briefly, then, Mr. Kosher.

(Whereupon, argument was made for and on behalf of the Defendant Sam Blassingame by Mr. Kosher, and colloquy had by and between

Court and Counsel, and the following proceedings were then had, to wit:)

The Court: As to both defendants, then, we will proceed with the sentencing, if the Defendants will come forward.

Mrs. Songahid, I have reviewed the presentence report made in your case, and, likewise, Mr. Blassingame, I have reviewed a pre-sentence report made in your case, by the Probation Officer.

At this time, you are before the Court for imposition of judgment and sentence, and the Court will hear from you and your Counsel as to any matters you think the Court should consider in determining what the sentence should be.

I take it, Counsel, you know of no reason [231] why the Court should not proceed with the sentencing at this time?

Mr. Kosher: No.

The Court: Whoever wishes to may proceed first.

(Whereupon, statement was made for and on behalf of the Defendant, Sam Blassingame, by Mr. Kosher, and the following proceedings were then had, to wit:)

The Court: Mr. Prim?

(Whereupon, statement was made for and on behalf of the Defendant Songahid by Mr. Prim, and the following proceedings were then had, to wit:)

The Court: Mr. Prim, it is very difficult for this

Court to go on the assumption that this woman will change her way of life at this time.

Now, you state there are some circumstances that come along to indicate that she might have reason to change her ways, but having started, unfortunately, as young as she did, I am not concerned now with the background and circumstances that may have caused her or brought her on her unfortunate course, but what is there to indicate that she wouldn't continue?

(Whereupon, further statement for and on behalf of the Defendant Songahid was made by Mr. Prim, and the following proceedings were then had, to wit:)

The Court: Mrs. Songahid, what is your [232] view? What is your position?

Defendant Songahid: Well, I am going to try my best to do all I can to change my way, and try to make a better life for myself and my baby.

The Court: Do you think you can change after these years?

Defendant Songahid: Yes, I do.

The Court: Where would you go?

Defendant Songahid: I want to go back to Ogden, Utah.

The Court: What would you do there?

Defendant Songahid: Work in a restaurant.

The Court: Do you know people there where you could work?

Are they the people you were referring to?

Mr. Prim: These people I am referring to are in Portland, Oregon, but she has relatives there. They are very substantial people, high in the Church back there, in the Mormon Church. I feel that back in Ogden would be better for her than Portland.

The Court: What about your drug habit?

Defendant Songahid: I am not using any now.

The Court: How long were you on narcotics before?

Defendant Songahid: Well, I was off for fourteen [233] months, and I started using again, and used for eight months, and I have been off since August of last year.

The Court: Any indication, Mr. Stewart—did you handle this—any indication that this person is off drugs now?

Mr. Stewart: She says she is.

The Court: Have you any indication that she is off, or is using them?

Mr. Stewart: She says she has been off since August. As to whether she is, I don't know. But she has maintained she has been off since August.

Mr. Prim: If it pleases the Court, this girl came back, and she was in jail up until a few days before we went to trial, because there were some matters she had to straighten out with Judge Neargaard.

The Court: You were in the City Jail?

Defendant Songahid: County Jail.

The Court: Six months?

Defendant Songahid: Yes.

Mr. Prim: And unless she started a habit since this trial, I can assure you she didn't get it there.

The Court: You were in jail from August on?

Mr. Stewart: That is right, your Honor.

The Court: You haven't started using it since you were out on bail? [234]

Defendant Songahid: No.

The Court: It is a rather unusual case, a conspiracy charge. Ordinarily these cases wouldn't involve a woman. I am somewhat disposed to put you on probation and give you a chance, if you think you can straighten out. If you don't, I think it is a case where you can come back and get a pretty good sentence.

Mr. Stewart: I didn't hear what home she was going to in Portland.

Mr. Prim: Ogden.

Mr. Stewart: I think that would be all right, but not Portland, because the people she was with, the husband is serving time at McNeil, and the woman is a user.

The Court: I will tell you this, Mrs. Songahid, the Federal Court doesn't handle or have jurisdiction over prostitutes. It isn't the purpose of this Court to punish women for prostitution. You are charged here with conspiracy. The Jury found you guilty. Conspiring to violate the Mann Act is a serious violation. If you would straighten out, the Court might consider probation here, because, ordinarily, you wouldn't be before this Court on a Mann Act charge, or what is known as a substantive charge. If you want to go out and say you are going to lead a different life, and you want a chance, I [235] don't want to stop you. However, if you

don't do it, you will come back here and you will be sentenced for conspiring to violate the Mann Act, and that isn't going to be a ninety-day sentence for prostitution.

Do you think you can make it?

Defendant Songahid: Yes, I do.

The Court: Mr. Prim tells me you have written a book. Maybe you can—your young background was bad, but maybe you can straighten out. You understand this Court has no jurisdiction and doesn't propose to punish women for prostitution, but for violating the Mann Act, you can get a pretty rough sentence.

Under the circumstances I will put you on probation, and we will find out if you will straighten out. If you get on the narcotics habit, and into prostitution, you will come back here and get a sentence, and it won't be for prostitution, it will be for conspiring to violate the Mann Act, and I think there is evidence in here, and you weren't an innocent person by any means, you don't claim to be, and I think probably there is ample evidence upon which the Jury convicted you. So, in your case, we will give you that chance, but you are going to have to make reports, and if you violate them, and you come back, the Court can sentence you up to five years in the penitentiary.

This is your chance, if you want to do it, if [236] you want to take it, it is up to you. So, as far as you are concerned, Mrs. Songahid, it is the judgment of the Court—it is the judgment of the Court upon the verdict of the Jury, that you are guilty

as charged, and because of the unusual nature of this charge against a woman, the Court believes on the showing made, it is proper you be placed upon probation, and if you want to straighten out, all the more chance to you.

You will be placed upon probation for a period of three years.

One of the conditions of probation is that you do not violate the law, State, Federal or Municipal; that includes any type of violation. At the close of that period of time, you are free of this charge.

In the event you fail, you will come back, and having failed, you will be sentenced some time, up to five years. It might be a little bit more than you would get now, if you want to take the sentence now and get it over with. Any further conditions?

Of course, you must refrain from narcotics.

Mr. Stewart: What about permission, your Honor?

The Court: You can get permission to get to Ogden, but before you leave there, you must get written permission, and you must report as the Probation Officer directs. [237]

Anything further to do, Mr. Prim?

Mr. Prim: No, I will help her to straighten out.

The Court: It is up to you, and you will have a pretty tough time, and I will not stand in your way.

Mr. Kosher: Could I say something?

The Court: You may.

Mr. Kosher: I don't want to in any way say anything about this young lady, and I am glad she

has an opportunity to straighten up, but, of course, I represent the Defendant in this case, and I think the Court has found from the evidence that she was the moving spirit in this transport, and it seems to me he ought to be given an opportunity to straighten out.

The fact that he is a man, it seems to me, shouldn't make him any more culpable than the woman.

I don't like to be arguing against myself here; as I say, your Honor found she was the moving spirit in the transportation. She is by far the brighter of the two people.

The Court: Well, probably so, Mr. Kosher.

But the charge here is a violation of the Mann Act which is——

Mr. Kosher: A conspiracy. They are both charged with the same thing.

The Court: I understand. [238]

Mr. Kosher: In other words, I think they are both tarred with the same brush. There isn't much difference. If she gets probation, it seems to me only fair that he should have it because under the evidence in this case, she was the moving spirit.

The Court: Well, I am not going to discuss the merits of the situation particularly, Mr. Kosher, with you other than this:

With this girl, or woman, who started at eleven years old and was brought into prostitution violation of the Mann Act when she was sixteen, I think the situation is a little different. She is to be pitied. True enough, she is a veteran, hardened as a prostitute, and I think the Mann Act essentially is not

designed to punish the woman who may participate in these violations of the law. Primarily, they are intended and should punish the man, and the question—as you indicate, there is some question about whether a conviction of this kind will stand. The Court believes that the trial court shouldn't resolve that question against the charge, and if the Appellate Court should so find, that is a different proposition, but I believe that the law here involved, which there was a conspiracy to violate, is directed toward the man and directed toward the practice of inducing young women to enter upon an immoral life, using Interstate Commerce in [239] the course thereof. That is the situation, and possibly the Court might impose a sentence at this time, upon the woman, but while the record is very bad, she got into it possibly by others who were violating the Mann Act and she states she is going to straighten out, and if she doesn't, we will have time to find out, and she will be sentenced in due course. If she can straighten out, possibly there will be some rectification of this woman as a girl or a child. So far as Blassingame is concerned, do you have anything you wish to say?

Defendant Blassingame: No.

The Court: I don't have very much sympathy for you, Mr. Blassingame. I don't know how smart you are, or how much you were the victim of this woman as your Counsel might indicate you are, but I am inclined to think, from the probation report, that you have been smart enough to have avoided getting in trouble with the law before; not unwittingly, but

because you were probably smart enough to get on with your violations of the law without apprehension and conviction.

So, it is the judgment of the Court upon the verdict of the Jury of Guilty than you are guilty as charged, and it is the sentence of the Court that you be placed in the custody of the Attorney General of the United States or his duly authorized representative for a [240] period of four years, at such an institution as he may direct.

Mr. Kosher: May this record show that the Defendant gives notice of appeal at this time, and I imagine an appeal bond——

Mr. Harris: A written notice of appeal.

The Court: You will file your written notice of appeal and then file your bond.

Mr. Kosher: Can we do that today?

Mr. Harris: I am available.

The Court: Do you want to keep the defendant in custody?

Mr. Harris: I think so. The conditions of the original bond does not provide for any possibility of appeal.

The Court: Yes.

So, he can remain in the Marshal's custody during the day, is that right?

Mr. Kosher: I was going to go and get the notice of appeal, and I suppose we can come back here before the morning is over?

The Court: What time will you have this written one?

Mr. Harris: Probably two o'clock.

The Court: Right after Naturalization this [241] afternoon. We have Naturalization at 1:30 and we will take it at 2:00 o'clock, or shortly thereafter.

Mr. Harris: All right.

The Court: We will now take about a ten-minute recess.

(Whereupon, at 11:08 o'clock a.m., February 15, 1954, hearing in the within-entitled and numbered cause was recessed until 2:18 o'clock p.m., February 15, 1954, at which time counsel, except Mr. Prim, and Defendants, except Defendant Songahid, heretofore noted being present, the following proceedings were had, to wit:)

Mr. Harris: I have the judgment in the Sam Blassingame matter.

Songahid is in the typewriter, practically finished.

The Court: All right. Have you looked it over, Mr. Kosher?

Mr. Kosher: No, I haven't.

Mr. Harris: I have given a copy to the Defendant.

Mr. Kosher: Oh, that one. I have looked it over and it is all right, in accordance with the rule of the Court.

The Court: It is in accordance with the oral pronouncement?

Mr. Kosher: Yes. [242]

The Court: Do you have a bond?

Mr. Kosher: We have an order denying motion

for acquittal, and an order, and I have left the amount of the bond blank.

The Court: What was the amount one——

Mr. Kosher (Interposing): One thousand.

The Court: What is your recommendation, Mr. Harris?

Mr. Harris: I think it should be at least double, your Honor.

The Court: I was inclined to put it at twenty-five hundred dollars, or more.

Mr. Harris: Yes, your Honor.

The Court: Do you think that is sufficient?

Mr. Harris: I think that is sufficient.

The Court: Twenty-five hundred dollars?

Mr. Kosher: I thought double. He isn't going to go any place. He has three children here. He is not apt to go any place.

The Court: Two thousand?

Well, you feel two thousand is sufficient?

Mr. Harris: No, I would say that would be the least amount.

The Court: Well, I will fix it at twenty-five hundred dollars. Is written notice of appeal on file? [243]

Mr. Kosher: Your Honor, I have it here. I have served it upon Counsel for the Government.

The Court: And this is your name; you have signed this, Mr. Blassingame?

Defendant Blassingame: Yes, sir.

The Court: Is the bondsman here?

Mr. Lehman: Yes, sir.

The Court: And this is your signature, Mr. Lehman?

Mr. Lehman: Yes, sir.

The Court: In the matter of United States vs. Blassingame, judgment and sentence and commitment has been signed, and may be filed, and the order denying Defendant's motion for acquittal and new trial has been signed and may be entered, and the order admitting Defendant to bail has been signed and may be entered, and bond in the amount of twenty-five hundred dollars has been posted.

The Defendant is released under bond.

(Whereupon, a short recess was had in the above-entitled and numbered cause, and Counsel heretofore noted, except Mr. Kosher and Defendant Blassingame, being present, the following proceedings were had, to wit.)

Mr. Prim: She has received a copy of the judgment and the order of probation, your Honor, and she has read it. [244]

The Court: Do you agree it is in accordance with the Court's oral pronouncement?

Mr. Prim: Yes, your Honor, it is.

The Court: Have you read this, Mrs. Songahid?

Defendant Songahid: Yes.

The Court: Do you think you can comply with those conditions of probation?

Defendant Songahid: Yes, I do.

The Court: You really do?

Defendant Songahid: Yes.

Mr. Harris: I have an extra copy. Maybe I can give one to Mr. Prim, and also the Defendant.

Mr. Prim: Yes.

The Court: All right; well, if you can do that, the Court will be able to sign the fact that you have successfully completed probation three years from now.

Mr. Prim: I don't know whether your Honor has seen it, but she has the biography of her life, in which she says she is trying to do this, and I feel that with just a little help, she will break the habit.

The Court: Well, when you made the statement, Mr. Prim, I, of course, assumed you were placing it on some factual situation, and for the moment I questioned it because it isn't an easy thing to change a way of life after the difficulties you have had. However, it isn't [245] impossible, and I only hope you can do so.

I, however, should warn you, as I said this morning, that if you don't, and you come back here, you will be sentenced, and, of course, that is the only way a person can be released on probation.

The purpose of it is to help people straighten out, and sometimes it works, and sometimes it doesn't. But I always hope, when I grant probation, that I will not see the person again, at least, in the courtroom. but there are occasions that the Court imposes sentence, and it is usually longer than had the sentence been imposed in the first instance, so I hope you are able to meet these conditions of pro-

bation, and that you and Society and your child will all be better for it.

Mr. Prim: Thank you, very kindly, your Honor.

(Whereupon, hearing in the within-entitled and numbered cause was adjourned.) [246]

Reporter's Certificate

I, Earl V. Halvorson, Official Court Reporter for the United States District Court, Western District of Washington, Northern Division, hereby certify that the foregoing is a full, true and correct transcript of the matters therein set forth; and I hereby certify that the foregoing transcript has been prepared by me or under my direction.

[Endorsed]: Filed April 30, 1954. [247]

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen of the Jury: You have heard the testimony in the case, and you have heard argument of Counsel, and, as you know from other cases, it is now the obligation and duty of the Court to instruct you on the law applicable in the case.

Likewise, you know that these instructions are oral so far as these instructions are concerned, and as the Court gives them to you, you will not have the benefit of any copies to take to the Jury room, and, therefore, you will have to rely on your own

recollection when you apply those instructions to the evidence as you heard it in this [3*] case.

This is the method whereby you are advised as to the law, and how it should be applied to the evidence as you have heard it.

You must consider the instructions as a whole and be cautious not to single out one instruction and present that without applying the others in equal manner. In other words, the instructions are given and are to be construed as an entirety rather than single statements of law.

As you know, regardless of what your opinion may be, or the opinion of anyone else as to what the law is or should be, you are bound to accept the law as the Court gives it to you.

In this case, the defendants have been indicted by the Grand Jury, and charged with the crime as the Court will later indicate to you, and they are now on trial. They have pleaded not guilty. Therefore, the Government has undertaken the burden, as the law requires, and must establish beyond a reasonable doubt, every material allegation of that Indictment.

The Indictment itself is but a formal method of charging a defendant with a crime, or defendants in this case. In and of itself, it is no indication, and permits no inference or presumption, of guilt. Rather, the law [4] presumes every defendant innocent until he or she is proven guilty beyond a reasonable doubt by the evidence in the case; and this presumption is not a mere matter of form, but

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

a substantial right of every defendant in a criminal case, and the presumption continues throughout the trial and until such time as you find from the evidence that it has been overcome beyond a reasonable doubt.

In considering the evidence, and the law, as the Court gives it to you, and applying it to the evidence in the jury room, you are to perform your duty as jurors without prejudice and without bias and sympathy.

Both the defendants and the Government expect that you will carefully and impartially consider all the evidence, and follow the law as given you by the Court, and reach your verdict, a just verdict, regardless of the consequences.

The punishment provided by law for the offense charged in the Indictment is a matter for the Court —that is, the Judge—and the Judge, alone—and it is not to be considered by you in determining what your verdict shall be or determining whether the defendant is innocent or guilty—whether the defendants are innocent or guilty.

The term "reasonable doubt," as I have used it here, means in law just what the words imply—a doubt based [5] upon some good reason. It is one that must arise from the evidence or lack of evidence in the case. It must be a substantial doubt such as an honest, sensible, fair-minded man or woman might with reason entertain consistently with a conscientious desire to ascertain the truth. You must use your common sense as men and women possessing some knowledge of the ways of life and

if after examining carefully all of the facts and circumstances established by the evidence in this case you can feel and say that you have a settled and abiding conviction of the guilt of the defendant then you are satisfied beyond a reasonable doubt. If you have not such a conviction, then you should acquit the defendants; that is, find them not guilty.

Proof beyond a reasonable doubt does not mean that the evidence shall establish the guilt of the defendants beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at your hands.

Reasonable doubt may not be based upon a mere whim, and may not be based upon mere conjecture, nor may it be based upon some vague possibility or upon sympathy.

You have heard the witnesses testify in this case, and you, and you alone, are the judges of the credibility of those witnesses and the weight their testimony deserves. A witness is presumed to speak the truth; but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. You may and should consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to

which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed [7] as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it may deserve.

Evidence is introduced in a case and may be either direct or positive, or it may be circumstantial.

When we refer to direct or positive evidence, we refer to that evidence which we ascertain or know or interpret by virtue of our senses. We see, hear or feel things.

Circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocent, and incon-

sistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of such character circumstantial evidence alone, without any direct testimony at all, is sufficient to convict and you should review all of the circumstances in the light of this instruction as I have given it to you.

With relation to intent, which is always an essential part of any crime: [8]

Intent may be inferred from all the evidence in the case, including any acts done and statements made by the accused. The jury should consider all the facts and circumstances in evidence which may aid determination of the issue as to intent.

Intent as other factors or other issues in a case, may be proved by circumstantial evidence. Actually, intent can rarely be established by any other means than circumstantial evidence because while witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted.

When I say there can be no hearing, of course, a defendant may tell someone, but only in that respect are the senses available. Therefore, what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

We use the words inference and presumption:

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proven.

A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. That is, presumption [9] of innocence. Such a presumption continues in effect until overcome or outweighed by evidence to the contrary; but unless so outweighed the jury is bound to find in accordance with the presumption.

Again, relative to intent:

In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

A person is held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done.

An act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

Now, those foregoing instructions, Ladies and Gentlemen, are the general instructions which are applicable to this, as to most other criminal cases.

Now, going to the particular instructions as to be applied, as they are to be applied, to this case, I will first cover the Indictment and then the particular instructions which you should bear in mind as to the type of crime here charged: [10]

The Indictment in this case charges that on or

about January 5, 1953, at or near Portland, the defendant did conspire and agree together with each other, to commit an offense against the United States, that is, to knowingly and unlawfully cause the said Patricia Lewis to go in interstate commerce from Portland, Oregon, to Seattle, Washington, with the intent and purpose on the part of said Sam Blassingame and Patricia Lewis that Patricia Lewis should engage in the practice of prostitution and the defendants did knowingly cause said Patricia Lewis to go and to be carried as a passenger upon the line of a common carrier, to wit: United Air Lines, in the said interstate commerce.

The Indictment further alleges that it was a part of said conspiracy that the said Sam Blassingame should accompany the said Patricia Lewis across the state line from Oregon to Washington as a passenger upon the line of said common carrier, to Seattle, Washington, and in order to effect the object of said conspiracy, the said Sam Blassingame and Patricia Lewis did commit certain overt acts within the Northern Division of the Western District of Washington and within the jurisdiction of this Court, which overt acts are alleged as follows:

First, that said Sam Blassingame and Patricia Lewis bought airplane tickets at Portland, Oregon, via United Air Lines, to Seattle, Washington, on January 5, 1953. [11]

Second, that said Sam Blassingame and Patricia Lewis boarded United Air Lines airplane, Flight No. 675, at Portland, Oregon, to Seattle, Washing-

ton, on January 5, 1953, at approximately 3:45 p.m.

Third, that said Sam Blassingame and Patricia Lewis arrived at Seattle-Tacoma Airport, located in King County, in the Northern Division of the Western District of Washington, on January 5, 1953, at approximately 4:45 p.m. on board the United Airlines airplane, Flight No. 675.

Fourth, that said Sam Blassingame and Patricia Lewis, after arriving in King County, as heretofore alleged in the preceding paragraph of this Indictment, traveled by the same taxicab from said airport to an address near Jackson Street, Seattle, Washington, on January 5, 1953.

Fifth, that said Sam Blassingame on January 5, 1953, transported Patricia Lewis by private automobile from the address near Jackson Street, Seattle, Washington, to 3009½ E. Spruce, Seattle, Washington.

To the charges as set forth in the Indictment, the defendants have entered a plea of not guilty as stated and that places upon the Government the burden of proving beyond a reasonable doubt every allegation upon which they are now being tried. [12]

A conspiracy may be defined as a combination or agreement between two or more persons to do an unlawful act, or doing a lawful act by unlawful means, and the doing of some act by some one or more of them for the purpose of carrying the conspiracy into effect.

In considering your verdict you will first consider whether or not a combination or agreement to do an unlawful act exists, and if you find such a

combination or agreement did exist, you will then consider whether or not both of the defendants were parties to that agreement, which agreement, of course, could be either an implied or a tacit agreement and need not be in writing, or need not be expressly arrived at.

However, in conspiracy, there must be some unity of purpose, some common understanding, some meeting of the minds in an unlawful arrangement, and then to make a conspiracy a crime, the doing of some overt act, some action taken, to effect the object of the conspiracy.

The common design is the essence of the charge of conspiracy. Where an unlawful object is sought to be effected and two or more persons actuated by a common purpose, pursuing a preconceived plan to accomplish that purpose, act or work together in any manner in furtherance of the unlawful scheme, each party consciously participating is a party to the conspiracy no matter what part he takes in the execution of the object or plan; and where two or more [13] persons are proven to have combined together for the same illegal purpose, any act done by one of the parties in furtherance of the original concerted plan and with reference to the common object is, in the contemplation of law, the act of the other or of each.

You are instructed that it is not necessary that the Government prove every overt act charged in the conspiracy charge. Proof of one is sufficient. It is not necessary that it be proven that the defendants agreed orally or in writing to commit the crime

charged. It is sufficient if there was a tacit or implied understanding, as I indicated before.

You are instructed that it is a violation of the laws of the United States for a person or persons to knowingly persuade, induce, entice or coerce any woman or girl to go from one place to another in interstate commerce for the purpose of prostitution, or with the intent and purpose on the part of each person or persons that such woman or girl shall engage in the practice of prostitution, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier in interstate commerce.

There has been evidence in this case concerning certain statements made by one of the defendants to an agent [14] of the F.B.I. Statements made after the arrest of the defendants are admissible against the particular defendant making the statements and not against the other defendant. Statements, however, made by any one of the defendants during the course of the conspiracy, provided you find from the evidence beyond a reasonable doubt that a conspiracy existed, are admissible against not only the person making the same but against each of the defendants who at said time had entered into the conspiracy.

If you find from the evidence that the witness, Patsy Ruth McCandless, was a person engaged in immoral practices, this finding by you is immaterial to the case, for you should not concern yourselves with whether or not she should be punished for

violating the State law, inasmuch as that is a matter solely for the State authorities and over which this Court has no control and no jurisdiction. Jurisdiction is conferred upon the Federal Government only when a woman or girl is transported in interstate commerce for the purposes about which you have heretofore been instructed. In other words, the basis of the Federal Government's jurisdiction is transportation in interstate commerce, and when that element is absent the Federal Government has no jurisdiction.

Certain evidence has been admitted in this case, particularly in connection with the testimony of [15] Mrs. McCandless and Mrs. Smith, with relation to certain acts of both defendants that may have been in violation of State law and which were—which acts were—unrelated to the charge made in the Indictment, or in the Indictment, in this case. Such evidence is not to be considered by you for any purpose until such time as you may find from other evidence in this case beyond a reasonable doubt that the conspiracy alleged existed.

When and if you so find, then such evidence may be considered by you in determining the intent or purpose of the defendants in so conspiring.

You are instructed that on the question of whether the alleged conspiracy existed as charged you are not to consider any statements made or acts done by any defendant in furtherance of the alleged conspiracy in the absence of other defendants except against the individual making the statements or doing the acts, unless you are convinced by the evi-

dence beyond a reasonable doubt that the defendant so making such statements or doing such acts was authorized by the other defendants to make those statements or do those acts in furtherance of the alleged conspiracy.

There can be no conspiracy of any kind unless three elements are present. Those are:

First, the act of conspiring together of two [16] or more persons, in this case only two persons.

Second, to commit the particular offense charged in the Indictment. That is, the transportation in interstate commerce for purposes of prostitution of the defendant Lewis.

And, third, the doing of something in furtherance of the unlawful design, although it is not necessary that the objects of such design be accomplished.

There is no such thing as one person conspiring. A person who alone plans and commits a criminal act is not guilty of conspiring.

You will note from the Indictment, or that the Indictment purported to charge a conspiracy, and sets forth a number of so-called overt acts. You are instructed that mere proof of an overt act, or overt acts, as charged in the Indictment—proof of those alone proves no conspiracy without further proof beyond reasonable doubt of an unlawful agreement entered into by two or more persons, in this case two, as named in the Indictment, to commit the unlawful acts charged.

This is true, even though evidence shows the overt acts to be unlawful in and of themselves.

You are further instructed that such overt acts

must be found from the evidence to be clearly referable to the unlawful agreement, provided you find from the evidence that such unlawful agreement did in fact exist as [17] alleged in the Indictment.

Even participation in the offense itself which is alleged to be the object of the conspiracy does not necessarily prove a participant guilty of such conspiracy. There must in addition thereto be proof of participation and agreement by the said defendant, or defendants, with knowledge on his or her part of the existence of the unlawful agreement charged in the Indictment.

These matters must be proved by the evidence beyond a reasonable doubt.

The unlawful agreement is the gist of the offense of conspiracy, and unless you find both defendants named in the Indictment herein so entered into the unlawful agreement specifically charged in the Indictment, and actively participated therein and that one or the other of the defendants committed at least one of the overt acts alleged in the Indictment with knowledge and in furtherance of such unlawful agreement, you cannot find any or either of the defendants guilty in this case.

The issues in this case, as in all criminal or civil cases, is important. It is your duty, and I am confident that you will do your duty as jurors under the oath that you have taken, to conscientiously, seriously and free from prejudice or sympathy return a true verdict under the evidence and these instructions. [18]

It is not the policy of the law that a verdict of guilty should be returned against any one on trial unless such verdict is supported by the evidence beyond a reasonable doubt, but it likewise is against public policy that any person who has violated a law or regulation should escape if the testimony shows beyond a reasonable doubt that such person is guilty as charged.

It is your duty as jurors when you leave and arrive in your jury room to confer with each other freely, frankly, and discuss together honestly all the issues involved in this case for the purpose of agreeing upon a common verdict. The thought, of course, is in deliberation to harmonize your views so that you may all be in agreement on a lawful verdict. An agreement of a lesser number than twelve of you is not a lawful verdict.

As I have advised you, the law of this case is for the judge, and it is your duty implicitly to accept all the rulings that the Court has made in this case, and as well to accept the instructions now being given you; but as to the facts, and what the evidence proves, and what weight to give the testimony of the various witnesses, and particularly what inferences should be drawn from the facts and circumstances proved, that is exclusively your function.

With respect to that, you are independent, [19] controlled neither by any opinion that the Court may see fit to express, or by the arguments of counsel, although you have listened to them carefully, and you are entitled to consider the assistance counsel can give you in putting together the facts as they

see them in any respect that they may be of assistance to you.

You, of course, must bear in mind that the argument of counsel and other statements made by counsel throughout the trial are not evidence, and are not to be accepted by you as such, unless, of course, they coincide with your recollection of the evidence as you recall it and, if you have any opinion that the Court has given any indication of the guilt or innocence of the defendants or the credibility or weight to be accorded any evidence, or the testimony of any witness, I wish at this time to let you know you are in no way bound to follow what you might think the Court believes or thinks as to the guilt or innocence or credibility or weight of evidence.

Those matters are entirely your responsibility.

In the event you should have occasion during your deliberations to communicate with the Court, you should knock at the door and advise the Bailiff of your request, or give him a note, but be cautious on these occasions, if they should arise, not to indicate numerically how you stand as to your verdict until you have reached a unanimous verdict. [20]

When you leave here, you should select one of your number to act as foreman or forewoman, and when you have reached your verdict, you should advise us and fill in on the form I will give you, whether the defendants are guilty or not guilty, and the verdict reads, The United States of America vs. Sam Blassingame and Mary Donna Songahid. That, apparently, is her true name, although she has been indicted under the name of Lewis.

The Indictment, or the verdict, reads:

"We, the Jury in the above-entitled cause, find the defendant Sam Blassingame"—and then there is a blank, "guilty as charged in the Indictment filed herein, and further find the defendant Mary Donna Songahid," and then there is a blank, "guilty as charged in the Indictment filed herein," and then there is a blank for signature, and a place for the date.

In the blank, if you find them not guilty, you will insert the word "not," and if you find them guilty, you will insert the word "is," so that it will read "is guilty" or "not guilty."

You must find both defendants guilty or not guilty in this case, because you cannot find one guilty and the other not guilty. [21]

* * *

VERDICTS

The Clerk: United States of America, Plaintiff, vs. Sam Blassingame, Mary Donna Songahid, Defendants, Cause No. 48895. [24]

Verdict:

We, the Jury in the above-entitled cause, find the defendant, Sam Blassingame, is guilty as charged in the Indictment filed herein, and further find the defendant, Mary Donna Songahid, is guilty as charged in the Indictment filed herein.

It is signed Marvin F. White, Foreman; dated January 22, 1954.

* * *

[Endorsed]: Filed September 7, 1954. [25]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, and designation of counsel for appellant, I am transmitting herewith the following original documents as the record on appeal from the Judgment, Sentence and Commitment, Filed February 15, 1954, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Indictment, filed December 30, 1953.

15. Motion for Judgment of Acquittal or for New Trial, filed January 29, 1954.

20. Order Denying Defendant's Motion for Acquittal and for New Trial, filed February 15, 1954.

21. Judgment, Sentence and Commitment, Blassingame, filed February 15, 1954.

23. Notice of Appeal, filed February 15, 1954.

26. Order on Petition for Extension of Time to May 15, 1954, in which to file transcript of record, filed February 26, 1954.

28. Designation of Record on Appeal, filed April 28, 1954.

29. Statement of Points on Which Appellant will Rely, filed April 28, 1954.

33. Copy of Court Reporter's Transcript of Trial Proceedings, filed April 28, 1954.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, $5.00; and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 7th day of May, 1954.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14352. United States Court of Appeals for the Ninth Circuit. Sam Blassingame, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 10, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth District

No. 14352

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM BLASSINGAME and MARY DONNA SONGAHID,

Defendants.

ADOPTION OF STATEMENT OF POINTS AND DESIGNATION OF RECORD

Comes Now the above-named defendant, Sam Blassingame, and hereby adopts the statement of points and designation of record appearing in the typewritten transcript of record in the above-entitled cause.

/s/ MAX KOSHER,
Attorney for Defendant,
Sam Blassingame.

[Endorsed]: Filed May 17, 1954.

No. 14352

United States Court of Appeals

For the Ninth Circuit

SAM BLASSINGAME, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from Judgment and Sentence in the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT

MAX KOSHER
JAMES TYNAN
Attorneys for Appellant

2919 Wetmore Avenue
Everett, Washington.

THE ARGUS PRESS, SEATTLE

No. 14352

United States Court of Appeals

For the Ninth Circuit

SAM BLASSINGAME, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from Judgment and Sentence in the United States District Court for the Western District of Washington, Northern Division

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United States Court of Appeals
For the Ninth Circuit

SAM BLASSINGAME,	*Appellant,*	No. 14352
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Appeal from Judgment and Sentence in the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT

JURISDICTION

This is an appeal from a verdict and judgment of conviction upon an indictment charging appellant and his co-defendant, Patricia Lewis, alias Pat Lewis, whose true name is Mary Donna Songahid (R. 190), with conspiracy to violate Title 18, U.S.C. Section 2422, the persuasion section of White Slave Traffic Act. Both defendants were found guilty. The defendant, Songahid, a white woman, was put on probation and has not appealed; the appellant Blassingame was sentenced to four years (R. 170).

Judgment was entered February 15, 1954 (R. 8). Notice of Appeal was filed February 15, 1954 (R. 10). On February 26, 1954, the district judge entered an order extending the time for filing the transcript of the record until May 15, 1954 (R. 11). The reporter's transcript was received by the Clerk of this court May 10,

1954. Before the record was printed an additional designation of the record was filed to include the Instructions and Verdicts, and these are incorporated in the record. The printed record was received by appellant October 5, 1954.

STATUTES INVOLVED

The White Slave Traffic Act as last amended is set forth as Sections 2421 and 2422, Title 18, U.S.C., and reads as follows:

§ 2421. Transportation generally.

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of

Columbia or any Territory or Possession of the United States—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 65 Stat. 812, amended May 24, 1949, c. 139, Sec. 47, 63 Stat. 96.

Reviser's Note. Based on Title 18, U.S.C., 1940 Ed., Secs. 397, 398, 401, 404 (June 25, 1910, c. 395, Secs. 1, 2, 3, 5, 8, 36 Stat. 825-827).

Section consolidates sections 397, 398, 401, and 404 of Title 18, U.S.C., 1940 Ed.

§ 2422. Coercion or enticement of female:

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both." (June 25, 1948, c. 645, 62 Stat. 812)

Reviser's Note: Based on Title 18, U.S.C. 1940 Ed., Sec. 399 (June 25, 1910, Ch. 395, Sec. 3, 36 Stat. 825)

THE INDICTMENT

The indictment in this case was returned in the Western District of Washington, Northern Division, and reads as follows:

"The Grand Jury charges:

COUNT I

"That on or about January 5, 1953*, at or near Portland, Oregon, Sam Blassingame and Patricia Lewis, alias Pat Lewis, did conspire and agree together, and with each other, to commit an offense against the United States, that is, to knowingly and unlawfully, and in violation of Title 18, U.S.C., Section 2422, cause the said Patricia Lewis, alias Pat Lewis, to go in interstate commerce from Portland, Oregon, to Seattle, Washington, with the intent and purpose on the part of Sam Blassingame and Patricia Lewis that the said Patricia Lewis should engage in the practice of prostitution and that said defendants did knowingly cause said Patricia Lewis to go and be carried as a passenger upon the line of a common carrier, to-wit, United Airlines, in the said interstate commerce.

"It was further a part of said conspiracy that the said Sam Blassingame should accompany the said Patricia Lewis across the state line from Oregon to Washington as a passenger upon the line of said common carrier to Seattle, Washington, and in order to effect the object of the said conspiracy, the said Sam Blassingame and Patricia Lewis did commit certain overt acts within the Northern Division of the Western District of Washington and within the jurisdiction of this court, to-wit:

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* There is error in the printed record. The correct date is January 5, 1953.

OVERT ACTS

"1. That said Sam Blassingame and Patricia Lewis bought airplane tickets at Portland, Oregon, via United Airlines, to Seattle, Washington, on January 5, 1953.

"2. That said Sam Blassingame and Patricia Lewis boarded United Airlines airplane, Flight No. 675, at Portland, Oregon, to Seattle, Washington, on January 5, 1953, at approximately 3:45 p.m.

"3. That said Sam Blassingame and Patricia Lewis arrived at Seattle-Tacoma Airport, located in King County, in the Northern Division of the Western District of Washington, on January 5, 1953, at approximately 4:45 p.m. on board the United Airlines airplane, Flight No. 675.

"4. That said Sam Blassingame and Patricia Lewis, after arriving in King County as heretofore alleged in the preceding paragraph of this Indictment, traveled by the same taxicab from said airport to an address near Jackson Street, Seattle, Washington, on January 5, 1953.

"5. That said Sam Blassingame on January 5, 1953, transported Patricia Lewis by private automobile from the address near Jackson Street, Seattle, Washington, to 3009½ E. Spruce, Seattle, Washington.

"All in violation of Sections 2422 and 371, Title 18, U.S.C." (R. 3-5)

STATEMENT

The appellant Blassingame is a colored man, married, with three children, living with his wife (R. 116). He has never been convicted of crime (R. 169). The co-defendant, Songahid, or Lewis, a white woman, is

a professional prostitute (R. 120). She is married and has a child living in Portland (R. 124-125).

The Trip to Portland

Both defendants lived in Seattle and were acquainted prior to and during the year 1952. On New Year's eve of that year the defendant Songahid went to Portland from Seattle by air (R. 140)., there to work as a prostitute (R. 114). She bought and paid for her own ticket (R. 120), and was not accompanied by appellant. She registered at the Chamberlain Hotel in Portland and stayed there two or three days, then went to stay with some friends in that city (R. 99).

The witness, Beulah Smith, a prostitute (R. 28-29), testified that she knew both defendants. They were in her house in Seattle sometime during the year 1952—she was unable to fix the time with greater certainty (R. 22, 26, 28)—and they told her they were going to Portland (R. 25). The witness wanted to go along but appellant told her there would be no colored people where they were going, and she couldn't go (R. 25).[1] Appellant did not say why he was going to Portland (R. 26).

The witness McCandless testified, over objection, that during the month of February, 1953, the defendant told her that she and appellant, Blassingame, had been in Portland (R. 83).

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[1] The co-defendant Songahid testified that she never knew the witness Smith prior to December 31, 1952 (R. 137-138). She testified she met Mrs. Smith the night she was released from jail, January 9, 1953 (R. 112-113).

The Return Trip from Portland to Seattle

The co-defendant, Songahid, returned from Portland to Seattle January 5, 1953. Appellant Blassingame accompanied her on this journey. The co-defendant explained this trip as follows: She was a narcotics addict, and as a stranger in Portland, she was unable to renew her supply. She wanted to get her clothes and and get some narcotics and return to Portland (R. 115). She did not go back to Portland because she was arrested within six hours of her arrival in Seattle, and knew she would have to wait there until the case was disposed of (R. 118).

On January 5, 1953, the co-defendant went to the airport in Portland. There she met the appellant, Blassingame; this was the first time she had seen him since her arrival in Portland (R. 100, 109), although she heard that he had been at her friend's house (R. 142).

Appellant and his co-defendant talked together at the airport and decided to purchase their tickets as husband and wife under the name of Mr. and Mrs. Sam Blassingame in order to make a saving under the family plan (R. 110). She gave him the money for her ticket and he bought both tickets (R. 100, 102, 110).[2]

Appellant bought his own ticket (R. 102).

Appellant and his co-defendant rode side by side to

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[2] The airplies agent, Caughey, testified that she bought the tickets (R. 56, 60), although he could not identify her (R. 59). Mrs. Songahid contradicted this (R. 144).

Seattle. They did not discuss her purpose in going back to Seattle, nor was prostitution mentioned (R. 117). Upon arrival they took a cab and were driven to the co-defendant's apartment at 3009½ E. Spruce Street in Seattle. Appellant did not get out of the cab (R. 116).[3] The co-defendant told appellant to tell his wife that she would come by and see her the next day and the two parted (R. 111). There was no talk of prostitution on the trip from the airport to her home (R. 111), nor at any other time (R. 117).

The Co-defendant's Arrest

The apartment where the co-defendant lived at 3009½ E. Spruce Street, Seattle, had been the scene of a previous arrest of the co-defendant (R. 117). On the night of her arrival, there was a police raid, and the co-defendant was arrested (R. 118), and charged with illegal possession of narcotics (R. 111) and prostitution (R. 117). This case was subsequently dismissed because of the illegality of the arrest and search (R. 112).

The raid took place four or five hours after the co-defendant got home. According to her, some fellows came up to her apartment and she saw no reason to turn them away (R. 150). One, a civilian, was a steady customer, and the other two, who were soldiers, were his friends (R. 151).

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[3] The FBI agent, Bush, testified that she told him that the cab took them to an address on Jackson Street, where appellant got his own car and drove the rest of the way (R. 100). This corresponds with the indictment. Mrs. Songahid testified that Mr. Bush was mistaken on this (R. 152).

The co-defendant was taken to the police station. While she was being booked, she was observed trying to get rid of some papers, and these were taken by the police (R. 36-37). They proved to be the ticket stubs for the airplane passage, and were introduced in evidence as Exhibits "1" and "2" (R. 38, 49).

Appellant was not present and did not visit the co-defendant while she was in custody. She was released on bail three days after her arrest, January 9 (R. 113).

The House on 22nd Avenue

On January 21, 1953,[4] appellant rented a dwelling house at 724 22nd Avenue South, Seattle. The witness, Patsy Ruth McCandless, was with him when he leased the place (R. 74), about three days later she moved into the house for the purpose of practicing prostitution (R. 71-77).

The witness, McCandless, solicited the co-defendant to live in the house and practice prostitution there (R. 113, 119). Mrs. Songahid testified that she did live there, but because she was ill she did not practice prostitution there (R. 114, 119, 149).

Others made use of the house for the same purpose (R. 119). The house operated about one month (R. 78).

SPECIFICATIONS OF ERROR TO BE URGED

1. The court erred in holding the indictment sufficient to charge a crime under Title 18, Section 2422,

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[4] This date is fixed by the testimony of Charles H. Winston (Reporter's Transcript, p. 106). The testimony of Mr. Winston was inadvertently omitted from the printed record.

U.S.C., objection being taken by counsel by motion for acquittal (R. 105, 157).

2. The court erred in holding the evidence sufficient to sustain a conviction under the indictment, objection being taken by counsel by motion for acquittal (R. 105, 157).

3. The court erred in admitting the ticket stubs, Exhibits "1" and "2" in evidence. Counsel for appellant objected to testimony relating to the exhibits on the ground that since appellant was not present, it was not binding on him (R. 36-37); and further objected when the exhibits were offered in evidence that they were incompetent, irrelevant and immaterial as to him, and that no connection was shown between the exhibits and appellant (R. 49).

4. The court erred in admitting hearsay testimony of the witness, McCandless, that appellant asked the witness about being his "old lady," (R. 65), which implied and involved working for him as a prostitute (R. 71). Counsel for appellant objected that the matter was immaterial, had no connection with the case, and would not tend to prove or disprove any issue in the case (R. 67); further on the ground that it tended to establish a separate and distinct crime, and was of a highly inflammable nature (R. 67); further by motion to strike the answer (R. 66).

5. The court erred in admitting testimony of the witness, McCandless, that the co-defendant told her in the absence of appellant that the appellant and co-defendant made a trip to Portland together. Counsel

for appellant objected that the testimony was hearsay (R. 79) as to him, and that the conversation took place after the co-defendant was arrested and the conspiracy, if any, had ended (R. 80).

6. The court erred in denying the motion to strike all the testimony of the witness, McCandless (R. 95, 157), on the ground that the events described by this witness took place on and after January 23, 1953, whereas the journey from Portland to Seattle was completed on January 5, 1953.

7. The court erred in permitting improper cross-examination of the co-defendant, Songahid, testifying as a witness for the defense. Counsel for appellant objected on the ground that only convictions of crime and not mere arrests could be shown to impeach the witness (R. 131).

8. The court erred in giving and refusing instructions as follows:

(a) In instructing the jury

> "There can be no conspiracy of any kind unless three elements are present. These are:
>
> "First, the act of conspiring together of two or more persons, in this case only two persons.
>
> "Second, to commit the particular offense charged in the Indictment. That is, the transportation in interstate commerce for purposes of prostitution of the defendant Lewis. * * * ." (R. 187);

because the statutes under which the defendants were indicted make the offense conspiracy to *persuade,* induce, entice or coerce a woman or girl to go, etc., and not *transportation,* etc.

(b) In giving improper instructions, damaging to appellant's case, as follows:

> "You must find both defendants guilty or not guilty in this case, because you cannot find one guilty and the other not guilty." (R. 191);

because the evidence might have shown the co-defendant guilty and yet not be sufficient to establish the guilt of appellant.

Appellant's counsel took no exceptions to the instructions, but asks the court to notice them under Rule 52(b), Rules of Criminal Procedure.

9. The court erred in denying the motion for acquittal.

10. The court erred in denying the motion for new trial.

SUMMARY OF ARGUMENT

I.

Both in the indictment and instructions the statute was misconceived and misconstrued, and it was impossible to remove these misconceptions by argument. The Mann Act or White Slave Traffic Act as it existed at the time of the commission of the supposed offense and at the time of the indictment is in two parts. The first (Sec. 2421), prohibits *transportation* in interstate commerce; the second (Sec. 2422), forbids the *persuasion, enticement, inducement* or coercion of the female, and thereby to cause her to go in interstate commerce. The two offences are distinct and separate, and an indictment under one section will not support a conviction under the other.

In the present case, the indictment was drawn under Sec. 2422, which section is referred to by number twice in the body of the indictment. The other section, 2421, is nowhere referred to. Yet there was no evidence whatever of persuasion or other synonymous act, nor any hint of coercion. There is no reasonable inference in the evidence of any of these things. The woman did not even acquiesce; she went on her own.

The indictment does not charge an offense under Section 2422. It charges a conspiracy *to cause* the woman to go, not a conspiracy to *persuade, etc.* The indictment is not good under either section; not under Sec. 2421 because it does not charge *transportation,* nor under Sec. 2422 because it does not charge *persuasion* or coercion.

Suppose the case of a man carrying on immoral relations with a woman in California. The man unilaterally decides to go to the state of Washington, and the woman follows him there. Can it not be said that he caused her to go? Yet no offense under federal law would be committed. He caused her to go by taking himself away, but he did not "persuade, induce, entice or coerce" her to go. The indictment here merely charges appellant with conspiring with his co-defendant "*to* knowingly and unlawfully, and in violation of Title 18, U.S.C., Section 2422, *cause the said Patricia Lewis, alias Pat Lewis, to go* in interstate commerce from Portland, Oregon, to Seattle, Washington, with the intent and purpose * * * that the said Patricia Lewis should engage in prostitution * * * " (R. 3). Whether he conspired with her to cause her to go or

not, he is not charged with conspiring with her or anyone else to persuade or entice or induce her to go, and that is the offense which is punishable by the statute under which he is charged.

The same confusion of thought is noticeable in the instructions given by the court. The indictment is outlined fully (R. 182). There is no elaboration of the meaning of the words, "causing" the woman "to go." The words of the statute, "persuade, induce, entice, coerce" are mentioned (R. 185), but the jury is not told that they must find these things or any one of them in order to convict.

The woman who aids or assists in her own transportation is not guilty of a violation of the Mann Act. *Gebardi v. United States,* 287 U.S. 112. It follows that she cannot be guilty of conspiring to do so. *Idem*; see also, *Ellis v. United States,* 138 F.(2d) 612 (8th Cir.) And for a stronger reason, if she cannot be guilty of conspiring to commit the crime, she cannot be guilty of conspiring to persuading herself to do so.

II.

The evidence establishes parallel action, not conspiracy. The two defendants found themselves in Portland in the state of Oregon. Both desired to go to Seattle, Washington. By pooling their resources they could go cheaper. Although this was a fraud on the airline, it was not an offense against the United States. Each had his own purpose in going to Seattle, she to get her clothes and a supply of narcotics; his purpose is not specified, but there is nothing in the evidence to

lead even to an inference that it had anything to do with her.

Even if appellant had prostitution in mind in making the journey, there is nothing to lead the reasonable mind to believe that his plans included his co-defendant. Later, it is true, he opened a house of prostitution in Seattle, but there is nothing to show that he had even this in mind at the time of the trip. And while the co-defendant became an occupant of that house, it was upon the solicitation of the witness, McCandless, not appellant. There is nothing but coincidence here.

The opening of the house on 22nd Avenue was on January 23rd and the journey was completed January 5th. Much came between these two dates. The co-defendant was arrested, confined in the city jail, bailed out, and the charge was ultimately dismissed. Appellant had nothing to do with any of these things. In short, the conspiracy, if it ever existed, came to an end long before the house was opened.

Appellant did not cause his co-defendant to go from Portland to Seattle, nor did he conspire with her to induce her to go. She had made up her mind—indeed she had a compelling cause if we are to believe her story that she had run out of narcotics; the trial judge believed that she was a genuine addict (R. 164)—and she would have gone back to Seattle with or without him.

The crime of conspiracy is "always predominantly mental in composition because it consists primarily of a meeting of minds and an intent." *Krulewitch v. Unit-*

ed States, 336 U.S. 440, 448, 93 L.Ed. 790, 796. There is no evidence to show that appellant had any intention to conspire to induce his co-defendant to persuade herself to go in interstate commerce for prostitution.

While conspiracy cases are difficult of proof, there is still the requirement that to convict there must be proof beyond a reasonable doubt. Conspiracy is not an omnibus charge under which the sins of a lifetime may be shown. Nor can a conspiracy be implied or constructed except as shown by evidence. And the usual rule prevails in conspiracy as in other crimes, that if the conviction rests upon circumstantial evidence, the evidence must exclude every reasonable hypothesis of innocence; the facts proved must all be consistent with and point to the guilt of the defendant only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and consistent with them all. If the evidence can be reconciled with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

The appellate court will examine the evidence in this type of case, even after the verdict of a jury, to determine whether a crime has been committed. *Mortensen v. United States,* 322 U.S. 369, 88 L.Ed. 1331.

III.

During the course of the trial, reversible error was committed in several particulars.

A. The airline ticket stubs (Ex. "1" and "2") were

taken from the co-defendant upon her arrest in Seattle about five hours after the arrival of appellant and co-defendant. They were not shown as having been in his possession or under his control, nor were they issued to him. They were admitted over objection (R. 49), on the promise they would be connected up. Although the jury was instructed generally that acts and statements of one defendant would not be binding upon the other, unless a conspiracy was shown, there was no direct reference to them. These documents bore appellant's name and probably weighed heavily against him.

B. In proving the case the Government relied almost entirely upon hearsay. The Government's case in chief was the testimony of Beulah Smith that the defendants contemplated a trip to Portland; the testimony of Millard M. Bush, Jr., that he was told that the co-defendants rode from Portland to Seattle together in an airplane, having pooled their funds for the payment of the tickets. To show that appellant made the trip from Portland to Seattle for the purpose of prostitution and debauchery, hearsay was introduced through the witness, McCandless, showing the opening and operation of a house of prostitution at 724 22nd Ave. S., Seattle, in which the co-defendant and alleged co-conspirator stayed for a time.

C. Other hearsay declarations were permitted showing the commission of crime, and that appellant was a loathsome character. A cautionary instruction was given that such evidence was not proof of the crime charged in the Indictment (R. 72), but in the final instructions, the jury was told that the evidence might

be considered if they found that a conspiracy existed (R. 186).

D. The operation of the house on 22nd Avenue, told by the witness, McCandless, was admitted under the guise of intent. Motion was made to strike all this testimony, and denied. This came after the conspiracy, if any, had ended, and hence was inadmissible.

E. The co-defendant was subjected to a rigorous cross-examination, in which her "brushes with the law" were thoroughly explored. The federal rule is that only convictions of crime may be shown to impeach a witness, and such convictions must rise to the dignity of a felony or petit larceny. Many arrests in different states were shown, all to the prejudice of the appellant.

IV.

The instructions given by the court have already been discussed in part. They were further faulty in a serious particular. The court told the jury that they must convict both or acquit both. Appellant did not take the stand, his co-defendant did. The evidence thus was not the same as to each defendant, and to require the same verdict as to both is to ignore the differences in the evidence. Nor can such instruction be justified on the ground that the jury must have found that a conspiracy existed. Declarations and acts of one not done or said in the presence of or with the sanction of the other, to be admissible, must be shown to have been in furtherance of the conspiracy. Many of the acts done and things said here were for the individual's own benefit. The co-defendant might have convicted her-

self by her own admissions of crime. She was seriously impeached. Appellant had no convictions, and also exercised his privilege of remaining silent. By the instruction complained of he was denied the benefit of these things.

ARGUMENT

I.

ONE CANNOT CONSPIRE TO PERSUADE ONESELF AND THE INDICTMENT, THEREFORE, DOES NOT CHARGE A CRIME

The Indictment charges a conspiracy under Title 18, Section 371 to violate Section 2422 of the same title. A reading of the latter section will show that the gist of the crime is the persuasion, enticement, inducement or coercion of a woman or girl. If one exercises these blandishments or pressures *and thereby causes the female to go* in interstate commerce for the purpose of prostitution or debauchery, he violates the law as expressed in Section 2422. But if the woman is caused to go by any other means than those designated, the defendant is not guilty.

We are taught by *United States v. Holte,* 236 U.S. 140, 35 S.Ct. 271, 59 L.Ed. 504, L.R.A. 1915D, 281, that a woman may be guilty of conspiracy to transport herself. But there it was *transportation* that was involved, not *persuasion.* And in the often cited case in this circuit, *Corbett v. United States,* 299 Fed. 27 (9 Cir. 1924), the woman solicited her own transportation in interstate commerce; in other words she took an active part in the conspiracy to *transport* herself. There was noth-

ing involving persuasion or inducement of herself by herself; she persuaded the man to send her the money for the ticket so that she could get to Boise. And she was indicted for conspiracy to transport herself, not to persuade herself.

In *Gebardi v. United States*, 287 U.S. 112, 77 L.Ed. 206, 53 S.Ct. 35, it was held that a charge of conspiracy *to transport* was not sustained by evidence of mere acquiescence. The woman not being punishable under the Act for transporting herself, could not be indicted for agreeing to such transportation. If she could not be held for conspiracy to transport, how much less can she be held for conspiracy to persuade herself?

> "Where the criminality of conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment." *Pettibone v. United States,* 148 U.S. 197, 203.

Under Section 2422 the purpose must be to persuade, induce, entice or coerce, yet these words are nowhere used in the Indictment.

If the act sought to be punished consists in conspiring to *transport* a woman, then the indictment must be laid under Section 2421. And where the indictment is drawn under Sec. 2 of the Act (Sec. 2421), a conviction cannot be sustained where the evidence shows a violation, if any, under Sec. 3 (Sec. 2422). *LePage v. United States,* 146 F.(2d) 536 (C.C.A. 8th 1945); *Graham v. United States,* 154 F.(2d) 325 (C.A. D.C. 1946).

In *United States v. Martin,* 191 F.(2d) 569, the Court

of Appeals for the Seventh Circuit, reversing the district court in *United States v. Holz,* 103 F.Supp. 191, held that a woman defendant was not guilty of conspiracy to violate the statute. She had been indicted together with her co-defendant, Martin, for violation of Sec. 2421, and of conspiracy to violate said section. The Court of Appeals found that the defendants met at Kankakee, Illinois, and the male defendant then drove the female in his own car from that place to Logansport, Indiana. The woman did nothing more than assent to and acquiesce in her own transportation, which was for the purpose of placing her in a house of prostitution. Under the rule of the *Gebardi* case (287 U.S. 112), it was held that she could not be found guilty of conspiracy. *Miller v. United States,* 95 F.(2d) 492 (9th Cir.), was cited in support of the decision.

It is very doubtful, in light of the *Gebardi* case (287 U.S. 112), whether an indictment could ever be framed for conspiracy to violate Sec. 2422. This section formerly contained the words, "aid or assist" in the inducement of the prohibited transportation. These words were removed by the 1948 amendment.[5] In the *Gebardi* case the Supreme Court said:

> "Section 3 of the Act (U.S.C. Title 18, Sec. 399), directed toward the persuasion, inducement, enticement or coercion of the prohibited transportation, also includes specifically those who 'aid or assist' in the inducement or the transportation. Yet

[5] The reviser's notes say: "The references to persons causing, procuring, aiding or assisting were omitted (in the 1948 amendment) as unnecessary as such persons were made principals by Section 2 of this title (Title 18)."

> it is obvious that these words were not intended to reach the woman, who *yielding to persuasion,* assists in her own transportation." *Gebardi v. United States,* 287 U.S. 112, 119, (footnote 2), 77 L.Ed. 206, 209, 53 S.Ct. 35, 84 A.L.R. 370, 373. (Italics supplied.)

What the *Gebardi* case, decided in 1932, does to the *Corbett case* (299 Fed. 27) (9th Cir., 1924) is difficult to say. It is doubtless because of this that the trial judge was in doubt, but nevertheless felt that he should sustain the Indictment (R. 169). It may be that because of the active solicitation by the woman of her own transportation in the *Corbett* case, that case represents the exceptional situation envisaged in the *Holte* case (236 U.S. 140). And it may be reconciled upon the principle laid down by this court in *Stack v. United States,* 27 F.(2d) 16 (C.C.A. 9). That principle has been stated as follows:

> "The final question relating to agreement and the one which has most confused the decisions of the Circuit Courts of Appeals now arose: Will mere participation in crime amount to conspiracy to commit it? . . . The Ninth circuit took the ground that participation in the substantive offense might or might not prove conspiracy and illustrated its view by affirming the conviction of the owner and the cashier of a cafe who sold liquor illegally and reversing that of the waiter who served it. *Stack v. United States, . . .* " 23 *Virginia Law Review* 909.

In the case at bar, however, the woman did nothing but go from Oregon to Washington, and the evidence shows that she would have gone anyway. It does not appear that she persuaded Blassingame to go with her,

nor that Blassingame persuaded her to go. Since the Supreme Court held in the *Gebardi* case that Congress in the Mann Act evinced an intention to let the woman's participation go unpunished and she could not, therefore, be held for conspiracy, it is submitted that no crime was committed even if the Indictment had been laid under Sec. 2421. Certainly there was none under Sec. 2422.

II.

THERE WAS NO PROOF OF ANY CONSPIRACY AND THE MOTION FOR ACQUITTAL SHOULD HAVE BEEN GRANTED

One cannot conspire by oneself, it requires at least two persons to make a conspiracy. Therefore, if Mary Donna Songahid, alias Patricia Lewis, the co-defendant, cannot be held for the crime of conspiracy, the appellant must also be released. *Gebardi v. United States,* 287 U.S. 112, 123, 77 L.Ed. 206, 212, 53 S.Ct. 35. In that case the court said (p. 123):

> "On the evidence before us the woman petitioner has not violated the Mann Act and, we hold, is not guilty of a conspiracy to do so. As there is no proof that the man conspired with anyone else to bring about the transportation, the convictions of both petitioners must be reversed."

If there was a conspiracy formed in Seattle prior to the trip to Portland (and this is not alleged) the proof of it must rest in the testimony of the witness Beulah Smith. There is no other testimony of any witness which tells of the plans of the appellant and Mrs. Songahid, except that of Mrs. Songahid herself.

The witness Smith testified that she had known Blassingame three or four years (R. 19). She met Mrs. Songahid (Pat Lewis) "along about the last of 1952," when Mrs. Songahid came up to her house with Blassingame (R. 19). The witness testified that she fixed something to eat, they sat and played some records, and she left and he left (R. 20). There was no discussion of prostitution. Apparently there were other visits (St. 12), but the only evidence pertaining to a journey was this:

> "(By Beulah Smith) Well, I don't know, the last time she was up to my house, we was supposed to go away some place, and I wanted to go with them. That is all I know." (St. 23)
>
> * * *
>
> By Mr. Harris:
>
> Q Did she at any time during the latter part of 1952 tell you she was going to go away, or go on a trip?
>
> A Yes. I wanted to go. Two or three of us was supposed to go. I wanted to go, but then Sam did tell me I couldn't go because there would be no colored people where they were going. (R. 24)
>
> * * *
>
> The Court: The answer may be stricken (R. 24).
>
> * * *
>
> Q Mrs. Smith, did Pat Lewis say where she was going?
>
> A She said she was going to Portland. That is all I know. (R. 25)
>
> Q What, if anything, did you say to her after that or—Yes, what, if anything, did you say to her when she told you she was going to Portland?

A Well, we just talked as usual; nothing in particular.

Q Well, did you—did you have—did you ask Sam Blassingame anything at this time?

A Yes. I told you I asked him, and he said there would be no colored people where he was going.

Q What did you ask him?

A I wanted to go with him. (R. 25)

Q What did he say?

A He just said there wouldn't be any colored people where he was going, and I couldn't go.

Q Did Pat Lewis tell you why she was going to Portland?

A She just said she was going to make some money. That is all.

Q Did Sam Blassingame tell you why he was going to Portland?

A No. (R. 26)

* * *

Q Why did you ask Sam Blassingame to go to Portland with him?

A Well, I always go somewhere with him. We always ride around the street together, and we were friends, and I didn't think that there was any harm if he was going off, if I could go with him.

Q From Seattle to Portland?

A Yes." (A. 29)

The police officers, Scott, and Francis, testified as to the search of the person of the defendant Songahid when she was booked at the Seattle Police Station, after the arrest in her home January 5th. The two defendants arrived at the Seattle air terminal about five o'clock that evening. Each defendant went to his re-

spective home, and the defendant Songahid was arrested early in the morning of the 6th; the search was made pursuant to this arrest.

During the search two airline ticket stubs were taken from the person of the defendant Songahid and were introduced in evidence as Exhibits "1" and "2" (R. 39, 49).

The testimony concerning these exhibits came from the witness Bush, an FBI agent (R. 97), the witness Caughey, the ticket agent (R. 54), and the co-defendant, Songahid. Bush, over objection by Blassingame (R. 98), on grounds of hearsay, testified that Mrs. Songahid told him at the jail that she went to Portland for the purpose of practicing prostitution and of her activities there; that she visited her friends, Alvina Neuman and Madison Wilson, and on January 5, 1953, she decided to return to Seattle to get her clothes and renew her supply of narcotics. She told Mr. Bush that when she arrived at the airport she saw Blassingame. This was the first time she had seen him since leaving Seattle. She had known him merely as an acquaintance and had no connection whatsoever with him (R. 100).

While at the airport they decided to purchase their tickets together as man and wife; by these means they could get the benefit of reduced fare, as a wife could travel at half fare (R. 100). She gave Blassingame the money for her ticket and he purchased the tickets for both, and they rode side by side to Seattle (R. 100). Upon arrival at the Seattle airport, they took a taxi and went to their respective homes. (Mr. Bush recalled that Mrs. Songahid told him that the taxi took them

to an address on Jackson St., where Blassingame got his own car and drove her home. Mrs. Songahid testified that this was incorrect, and that he took her all the way to her own home in the taxi.)

Whatever may be the fact as to the completion of the journey, there can be no doubt that Blassingame did not see or communicate with Mrs. Songahid until after she was released from jail three days later. He dropped her off and went on his own way to his home. He had nothing to do with her arrest, was not present at any time in her home, either before or after her arrest, and did not visit her in jail.

Mrs. Songahid's testimony on her own behalf did not differ materially from the account given by Mr. Bush. She saw Blassingame at the airport in Portland, January 5th; this was the first time she had seen him in Portland (R. 109), although some friends told her he had been there (R. 142). She had known Blassingame and his wife for some years, and had lived in his home; Mrs. Blassingame took her in when she was ill (R. 133). She identified Mrs. Blassingame in the court room and knew they had three children (R. 116).

Although she went to Portland to practice prostitution, her return to Seattle was not for that purpose. She said she wanted to get her clothes and obtain some narcotics (R. 115). She could not replenish her supply in Portland as she had no "connection."

She had been accustomed to going from state to state in pursuit of her calling, and always went on her own; Blassingame never took her anywhere (R. 121). She did not discuss with him her purpose in going from

Portland to Seattle (R. 115-115), nor did she talk about opening a house in Seattle (R. 116-117). She did not go to Portland with him, she went from Seattle to Portland by herself (R. 120).

When Blassingame saw her at the airport in Portland, he asked her if she was going to Seattle. She gave him the money for her own ticket and he bought both tickets; she said they could get them a little cheaper that way (R. 110).

This was the Government's case to establish a conspiracy to violate Sec. 2422, Tit. 18, U.S.C.A. The only other witnesses who testified were Patsy Ruth McCandless (R. 62), and Charles H. Winston. Mrs. McCandless testified that the appellant rented a house on 22nd Avenue South in Seattle; that appellant induced her to move there and that she practiced prostitution there and the defendant Songahid was also an inmate of that house. The testimony was admitted only to show intent on the part of the defendants (R. 70). Mr. Winston was the real estate broker who handled the renting of the house.

It is submitted that the foregoing is wholly insufficient to prove the conspiracy. No substantive crime is charged against either defendant.

> "A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means * * *
>
> "It is a partnership in criminal purposes. * * * " *Marino v. United States,* 91 F.(2d) 691 (9th Cir.), 113 A.L.R. 975.

The fact that conspiracy cases are difficult of proof does not dispense with the requirements that there must be proof beyond a reasonable doubt. *United States v. St. Louis Dairy Co.,* 79 F.Supp. 12. Mere suspicions or association cannot establish the conspiracy; there must be some evidence of participation in the commission of the offense; *Dong Haw v. Superior Court,* 183 P.(2d) 724, 727 (Cal.); *People v. Long,* 93 Pac. (Cal.) 387, 390; *People v. Zoffel,* 95 P.(2d) (Cal.) 160. Presumptions of guilt are not lightly to be indulged in from mere meetings. *United States v. Di Re,* 332 U.S. 581, 593, 92 L.Ed. 210, 219; *United States v. Maloney,* 200 F.(2d) 344, 347 (7th Cir.).

The scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment, which may limit the scope, but cannot extend it. *Terry v. United States,* 7 F.(2d) 28 (9th Cir.)

> "Conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime." *Terry v. United States,* 7 F.(2d) 28 (9th Cir.).
>
> " * * * There can be no judge-made offenses against the United States and every federal prosecution must be sustained by statutory authority. No statute authorizes federal judges to imply, presume or construct a conspiracy except as one may be found from evidence * * * ." Jackson, Frankfurter and Murphy, JJ. in *Krulewitch v. United States,* 336 U.S. 440, 456, 457, 93 L.Ed. 790 801.

Proof of conspiracy must rest in evidence *aliunde;* the conspiracy may not be established by hearsay

declarations of one of the co-conspirators. *United States v. Schneiderman,* 106 F.Supp. 892, 901.

The general rules governing criminal trials apply likewise in cases of conspiracy.

> "It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; and, where that proof is, in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence." *United States v. Lancaster,* 44 Fed. 896, 904, 10 L.R.A. 333; quoted in *Terry v. United States,* 7 F.(2d) 28 (9th Cir.).
>
> "I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled with either the theory of innocence or with guilt, the law required that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted." *United States v. Richards* (D.C.) 149 Fed. 443, 454, quoted in *Terry v. United States, supra* (9th Cir.)

The purpose of the journey is what determines whether the statute is violated. If the journey is under-

taken for an innocent purpose, the fact that an unlawful design is formulated after the transportation is complete does not render the transportation criminal. *Gillette v. United States,* 236 Fed. 215. Here there is nothing to establish that the two defendants had other than a legitimate purpose in going from Portland to Seattle. They met at the airport and decided to share their resources to make the trip cheaper. True, there was a design to defraud the airline, but that is not the offense. So the only conspiracy is one that is not punishable.

In *Mortensen v. United States,* 322 U.S. 369, 88 L.Ed. 1331, the defendants operated a house of prostitution in Nebraska. They planned an automobile trip to Yellowstone National Park, and two of the girls who were inmates of the house asked to go along for a vacation. The trip was made, and upon their return the girls resumed their unlawful vocations. The defendants were convicted of violation of the Mann Act before a jury upon appropriate instructions, and the judgment was affirmed by the court of appeals for the eighth circuit. The Supreme Court reversed, holding there was no competent or substantial evidence to support the judgment.

There is nothing in the evidence showing previous sexual relations between the defendants, nor of association for purposes of prostitution, nor was there any suggestion of prostitution either before or upon the journey. Cf. *Johnson v. United States,* 215 Fed. 679. If a connection between the two defendants having its basis in immoral conduct or prostitution ever existed it was long after the journey was complete, certainly not

before the opening of the house on 22nd South. As to that house, it plainly appears that Blassingame went into this venture to make use of the talents of the witness McCandless, not his co-defendant.

While the jury might have been entitled to disregard Mrs. Songahid's testimony that there was no discussion of prostitution between appellant and herself, if a course of conduct between them was shown to overcome the denials, *United States v. Boston,* 134 F.(2d) 484 (2nd Cir.), here there was nothing prior to or at the time of the transportation which justified a refusal to credit the testimony. The operation of the house on 22nd Avenue came so long after the transportation as not to be referable to it.

> "But a different situation affects the prostitution counts. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago the defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that the defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal conviction cannot be allowed to rest on suspicion and there were no supplementary facts like those that support the sexual intercourse counts,—no proof that the defendant had ever been connected with or interested in brothels, or that prior to the act in Chicago he had ever aided this or any other girl to engage in prostitution." *Johnson v. United States,* 215 Fed. 679, 682, L.R.A. 1915A 862 (C.C.A. 7th).

To sustain a conviction it is necessary to find that it was the persuasions of the defendant that caused the

woman to go. *Welsch v. United States,* 220 Fed. 764, 771. There the court said:

> "In the case at bar there is nothing but speculation and conjecture upon which to rest a finding of that persuasion that the act denounces, while the interstate journey was to the girl's own home, a home of unquestioned respectability, in which she had lived for years and in which she continued to live for nearly or quite a year afterwards, with all the outward appearance of innocence and virtue."

That the purpose of the journey is of great importance in determining whether the conduct is criminal is shown *by Gillette v. United States,* 236 Fed. 215. There the defendant invited a girl to dinner. He was then called away on a business trip to another state. From there he telephoned the girl and asked her to keep the date in the sister state. They became intoxicated and sexual intercourse followed. It was held the evidence failed to show any criminal intent.

It is true that the unlawful intent or purpose may be inferred from the conduct of the parties within a reasonable time before and after the transportation. *United States v. Oriolo,* 49 F. Supp. 226 (D.C. Penna.). In that case the woman had worked for the defendant as a prostitute in Philadelphia before the events which led to the indictment. He took her by automobile on a vacation trip to Atlantic City. While there he was arrested and the car was impounded. They returned to Philadelphia by train. Before the train entered the state of Pennsylvania, he told her she would have to practice prostitution in order to pay the fine levied in

New Jersey. It was held that this was sufficient to show unlawful purpose of the journey.

In *United States v. Reginelli,* 133 F.(2d) 595 (C.C.A. 3), the defendant went from Camden, N. J. to Miami, Florida. From there he wired and telephoned the girl at Camden, expressing a desire for her company. She boarded an airplane in Philadelphia and joined him in Miami, using a ticket which he purchased for her. The immoral acts were committed in Miami. The girl testified that the trip was her own idea and that the defendant was opposed to it. The conviction was sustained, the court being of the view that the immoral purpose of the journey could be inferred from the subsequent acts and conduct.

In the case at bar there is nothing to show that prostitution or debauchery or other immoral purpose was involved. Certainly nothing happened at or near the end of the journey from Portland to Seattle to indicate any such thing. The only shred of evidence of anything later is the testimony of McCandless that she saw the co-defendant give appellant money at one time (R. 78-79). This was at the house on 22nd Avenue, long after any conspiracy was ended (the journey was completed January 5th and the house was not rented until January 23rd). *Krulewitch v. United States,* 336 U.S. 440, 442, 93 L.Ed. 790, 793. And besides, a reasonable explanation was offered: Mrs. Songahid said that she never gave Blassingame any money, but that she had paid back money that she borrowed from him (R. 114).

In *Fisher v. United States,* 266 Fed. 667 (C.C.A. 4th), it was held that where a defendant, who had been car-

rying on an illicit relationship with a girl, took her across the state line for a brief visit with relatives, returning the same day, after which their relations were resumed, there could be no conviction of violating the Mann Act.

> "Where an interstate journey was taken definitely for another purpose, and would have been taken in any event, the fact that illicit intercourse took place in the course of the journey, as an incidental occurrence, did not bring the case within the meaning and intent of the statute, and would not sustain a verdict of guilty." (p. 670)

Suppose it be conceded for the sake of argument that appellant intended upon arrival in Seattle to set up a house of prostitution, and that he transported his co-defendant to Seattle. He still would not be guilty of any offense under the statute. The Government must establish that appellant either transported or induced his co-defendant to agree to her transportation for the purpose of prostitution. A general evil intent is not enough; the intent shown must be particular, and it must appear that the purpose was to use that particular woman for that particular purpose. As was said by the Supreme Court in the *Caminetti* case (242 U.S. 470, 491, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168):

> "It may be conceded, for the purpose of argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate com-

> merce of women and girls with a view to the accomplishment of the unlawful purpose prohibited."

Appellant set up the house on 22nd Avenue with the McCandless woman in mind. This witness was not sure when she met appellant, but said it was in January, 1953. (The journey ended on January 5th). He asked her about being his "old lady" (R. 65). She asked to be allowed to think it over (R. 72). About three days later, she agreed and moved into the house (R. 73). She was with him when he rented the house on January 23rd (R. 74).

From this it plainly appears that the journey from Portland to Seattle was not taken with any thought of prostitution so far as Mrs. Songahid was concerned; the idea of opening a house for Mrs. McCandless came a great deal later.

Intent is an essential ingredient in the crime of criminal conspiracy, and must be established like any other fact, beyond a reasonable doubt. *Krulewitch v. United States,* 336 U.S. 440, 93 L.Ed. 790.

> "It is always predominantly mental in composition because it consists primarily of a meeting of minds and an intent." *Krulewitch v. United States,* 336 U.S. at 447.

As stated in the law review article which had the approval of the concurring judges in the *Krulewitch* case:

> "To prove a conspiracy it must be shown that the accused had knowledge of it, but mere knowledge or even approval of an unlawful design are not in themselves sufficient. The evidence must establish that there was unity of intent on the part of two or more persons to accomplish the end charged. That

which gives the crime its 'distinctive character,' said a Pennsylvania court, 'is unity of purpose, unity of design, focolization of effort on a particular project by the persons named in the indictment.' *Comm. v. Zuern,* 16 Penna. Supr. Ct. 588, 600. In *State v. King,* 104 Iowa 727, 74 N.W. 691, the accused, who had a grievance against *W*, told *D* if he would whip *W* someone would pay his fine. *D* replied that he did not want anyone to pay his fine, that he had a grievance of his own against *W* and that he would whip him at the first opportunity. Shortly after that *D* did beat *W* very severely. The accused did not assist *D* but, as the latter was withdrawing from the assault, the accused indicated satisfaction with what *D* had done. These facts did not establish a criminal conspiracy. There was no proof, said the Court, 'of any concert of action, or of any understanding or agreement therefor.' 'The mere knowledge,' it went on to say, 'acquiescence, or approval of an act, without co-operation or agreement to co-operate, is not enough to constitute the crime of conspiracy.' *D* had the intent, it was to be observed, to commit an assault on *W*. The accused had a like intent or, at least, was willing to enter into a scheme which contemplated an assault on *W*. But *D* did not intend to make a common cause with the accused of an assault on *W*. The evidence failed to establish an agreement.'' Harno, Intent in Criminal Conspiracy, 89 Univ. of Penna. Law Review 624, 633.

Continuing, this author says:

''The crime of conspiracy . . . is heavily mental in composition. In the majority of crimes it is the act with which the law is most concerned; the intent in those crimes is a factor that must be established as a condition to holding the accused criminally re-

sponsible for the act. It is present when one harbors an intention to do an anti-social act, and it is greater when two or more hold it separately. Their behavior becomes criminal when they agree to make a common cause of committing that act. Their agreement, it is said, is the act in criminal conspiracy. In truth, it is but a step toward the accomplishment of another act, the commission of which the state wishes to prevent. The agreement is a step toward the accomplishment of a specific anti-social act. Turner has pointed out (Turner, Attempts to Commit Crime (1934) 5 Camp. L. J. 230, 235) while 'it is a broad rule of our Common Law that *mens rea* can be *either* the state of mind of the man who intends the consequences of his conduct, *or* the state of mind of the man who realizes what the consequences of his conduct may be and who . . . is reckless or indifferent to them,' that the crime of attempt requires a *mens rea* of the former kind exclusively. So it is with criminal conspiracy. Criminal conspiracy involves a specific intent to commit a particular act, the perpetration of which the state desires to forestall. As a problem in procedure, to establish a criminal conspiracy the state must prove an agreement on the part of two or more persons, and it must prove that the common intent flowing from that agreement was specific and was criminal." Harno, op. cit. p. 635.

And in conclusion, he says:

"The view is here advanced that these dangers would tend to be reduced once the basic principles of the crime and particularly the role of the intent element is clearly understood. The gist of the crime lies not, as has been often said, in the agreement. The agreement is a factor, but it is no more than that. The gist of the crime is in the intent. . . . Con-

spiracy is an *inchoate* crime for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent, and it is with the intent to commit that act that the state is concerned. The essence of the crime thus lies in intent." (*Id.*, p. 646)

III.

REVERSIBLE ERROR RELATING TO THE ADMISSION AND EXCLUSION OF EVIDENCE WAS COMMITTED DURING THE COURSE OF THE TRIAL

A. The ticket stubs, Exhibits "1" and "2" were not brought home to the appellant, hence were inadmissible as to him.

Exhibits "1" and "2" were passengers' coupons issued at the time the fare is paid. The flight coupon is given in exchange for passage and the exhibits are the part which the passenger keeps for his own records (R. 57). They were issued by the witness Caughey in Portland (R. 56).

When the co-defendant, Songahid, was arrested and booked, these exhibits were in her possession. At the booking office she was observed tearing something off a paper she had in her hand (R. 37). The portion she tore off bore the names "Mr. and Mrs. Sam Blassingame" (R. 37-38). Appellant's counsel objected to this showing but was overruled, and the court told the jury that the evidence pertained to the co-defendant only (R. 36). The exhibits were admitted and went to the jury (R. 49), on the promise they would be connected up with appellant.

There was nothing in the court's instructions at the

conclusion of the trial concerning these exhibits. They were not connected up unless we can say that the evidence establishes a conspiracy.

B. The hearsay declarations made in the absence of appellant, were prejudicial, and constituted reversible error.

The witness, Scott, a police officer, testified over objection, that a soldier named Parks said that he performed an act of prostitution with the co-defendant (R. 34). The witness further testified the co-defendant denied this (R. 33-34). Objection to hearsay testimony was taken twice (R. 32-33).

The witness, Smith, was permitted to relate conversations with the co-defendant which established that the co-defendant was a prostitute (R. 21, 23). Objection was taken each time by counsel for appellant on the ground of hearsay, but was overruled (R. 21-22).

The witness, McCandless, was permitted to testify that the co-defendant told her that the co-defendant and appellant had taken a trip to Portland (R. 83). Objection was taken on grounds of hearsay (R. 79), and on the further ground that the conversation took place after the termination of the conspiracy (R. 80).

The fact that the trip from Portland to Seattle was established by the Government through the testimony of an F.B.I. agent, Bush, who related what the co-defendant told him in the city jail after her arrest in Seattle upon completion of the journey (R. 99-101). Objection was taken to this testimony on the ground of hearsay (R. 98).

The testimony of the witness McCandless concerning a journey was objected to by counsel for Blassingame as incompetent (St. 83-86). It appeared that Blassingame was not present (St. 83). This objection was overruled but the court instructed the jury that before they could consider it they must find that a conspiracy existed (St. 84). Then the following occurred:

By Mr. Harris:

"Q What, if anything, was said then by Pat Lewis to you concerning a trip to Portland?

A Well, she said that she and Sam went to Portland.

* * * * * * * *

A She said her and Sam had went to Portland.

Q Had went?

A Had gone to Portland; had already been to Portland." (St. 88)

The foregoing testimony was inadmissible, not only on the ground of hearsay, but for other reasons. It was something that occurred after the conspiracy had ended, for if the object of the conspiracy was to induce the woman defendant to go from Portland to Seattle for the purpose of prostitution, the conspiracy had ended in success long before. *Krulewitch v. United States,* 336 U.S. 440, 442, 93 L.Ed. 790, 793. Furthermore, it was after the arrest of the woman defendant (*Id.*). What Songahid told McCandless was in no sense something said or done in pursuance of a conspiracy. It was but a narrative of past events and is clearly without the rule that renders the declaration of a co-conspirator admissible in evidence. *State v. Nist,* 66 Wash. 55, 118 Pac. 920.

In *Fiswick v. United States,* 329 U.S. 211, 91 L.Ed. 196, the defendants were indicted for conspiracy to defraud the United States by concealing and misrepresenting their membership in the Nazi Party. There was no direct evidence to convict. The district court admitted into evidence damaging admissions by each co-conspirator to agents of the FBI, after he was apprehended. Held, that since these admissions were made after the last proven overt act, they should not have been allowed, and reversible error was committed.

C. Hearsay declarations were allowed which imputed to the defendants the commission of other crimes.

The witness, McCandless, was permitted to testify that appellant asked the witness to be his "old lady" (R. 64). By this was meant working for him in a house of prostitution (R. 71-72). Objection was taken (R. 66, 67, 69, 71 and 73). The witness further was permitted to tell of a conversation in which the appellant was supposed to have told the witness what to charge for the acts of prostitution (R. 77), to which objection was taken (R. 77). Again, she was allowed to tell about committing acts of prostitution at the house on 22nd Avenue, to which objection was taken (R. 77).

> "Sometimes, although to our apprehension much less frequently than is perhaps generally supposed, jurors do altogether miss the issue they are to try. They are not altogether unlikely to do so, if it appears there is no question that the defendant has done something, whether charged in the indictment or not, for which he richly deserves condign punishment. . . . " *Van Pelt v. United States,* 240 Fed. 346.

D. The motion to strike all of the testimony of the witness, McCandless, admitted only for the purpose of showing intent, should have been granted.

The testimony of this witness related entirely to the opening and operation of the house on 22nd Avenue South, Seattle. This house was rented January 23, 1953. What we know about the operation of this house is obtained from the testimony of this witness. She testified over objection that after appellant asked her about being his "old lady" and waiting three days for her answer (R. 73), he drove her from Beulah Smith's place to the house. She took her clothes and the trip was made in his car (R. 73-74). She was with him when the house was rented (R. 74), and stayed there about a month (R. 78).

According to the witness, the place was operated as a house of prostitution and appellant told the witness what to charge (R. 75-76), to which objection was taken and overruled (R. 76-77). The money was turned over to appellant (R. 78), to which testimony objection was taken.

This witness was also permitted to testify over objection, that co-defendant told her that she and appellant had made a trip to Portland together (R. 79-83). She also testified over objection that the co-defendant turned money over to appellant (R. 78), and that the co-defendant boasted about how much she made (R. 79).

Was this testimony admissible to show the intent of the defendants in Portland when they pooled their funds and bought tickets on the United Airlines? We submit it is not. The trip from Portland was made January 5th; the house was rented January 23rd, and there

is nothing to show the slightest connection between the two defendants in that interim. The co-defendant became an occupant of that house at the suggestion of the witness, McCandless (R. 118-119). There is nothing in the evidence showing that the two defendants even saw each other from the time of their arrival in Seattle, January 5th, until two weeks after the house was rented, January 23rd.

In *Krulewitch v. United States,* 336 U.S. 440, 93 L. Ed. 790, the defendant was indicted for conspiracy to violate the Mann Act. The complaining witness testified that the defendant's co-conspirator came to her a month and a half after the complaining witness was induced to go in interstate commerce for the purpose of prostitution and asked her to conceal the crime. It was held that such hearsay declaration of the co-conspirator was inadmissible against the defendant. The court said:

> "The time of the alleged conversation was more than a month and a half after October 20, 1941, the date the complaining witness had gone to Miami. Whatever original conspiracy may have existed between petitioner and his alleged co-conspirator to cause the complaining witness to go to Florida in October, 1941, no longer existed when the conversation took place in December, 1941. For on this latter date the trip to Florida had not only been made —the complaining witness had returned to New York, and had resumed her residence there. Furthermore, at the time the conversation took place, the complaining witness, the alleged co-conspirator, and the petitioner had been arrested. . . .
>
> "It is beyond doubt that the central aim of the alleged conspiracy—transportation of the complain-

> ing witness to Florida for prostitution—had either ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. . . . The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The statement thus stands as an unsworn, out-of-court declaration of petitioner's guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of the objectives of the conspiracy charged in the indictment, because if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking. . . . "

The general rule is that evidence is inadmissible which tends to prove a crime other than that charged in the indictment. *MacLafferty v. United States,* 77 F. (2d) 715 (9th Cir.). There are exceptions to the rule, and one of them and the one relied upon by the Government in this case is that where the state of mind of the doer of an act is an essential element to establish its criminal quality, the intent may be shown by other acts of like nature, even though they be in themselves crimes. But the exception is not applicable where the other crime is subsequent to the one charged in the indictment. The reason is that what one does, as in this case, on January 23rd or thereafter, is not proof of what one intends to do on January 5th. *Witters v. United States,* 106 F.(2d) 837 (App. D.C.), 125 A.L.R. 1030.

In *Hall v. United States,* 235 Fed. 869 (9th Cir.), the general rule was recognized that where intent is an element, other acts may be shown; but where the defendant was on trial for an assault upon a nine-year-old child, evidence of a similar assault upon another ten-year-old child 33 months before should not have been admitted. This court said:

> "It is, however, never to be lost sight of that the defendant is entitled to be tried upon competent evidence and only for the offense charged, and where there is matter collateral to the issue to be tried, it is the duty of the court to see that proof of collateral matter which can really only tend to prejudice the defendant with the jurors and to produce the impression that he is of low and depraved disposition is not admitted. . . . It is not a logical inference to say that testimony of an assault upon a child nearly three years previously shows that defendant had a design to make an assault nearly three years later upon another child. It is too plain, however, that proof of such collateral matter tends to produce the belief that defendant is a person of depraved moral character, and is highly prejudicial to the defendant on trial before a jury. . . . "

The hearsay declaration of a co-conspirator, to be admissible, must be made before the termination of the conspiracy, and in furtherance of its object. *Myola v. United States,* 71 F.(2d) 65 (9th Cir.). So also, "before the declaration of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made." *Id.*

The declarations of one co-conspirator are not sufficient to establish the connection of a third person with the conspiracy. *Id.; Kuhn v. United States,* 26 F.(2d) 463 (9th Cir.). Statement or declaration of a conspirator, to be admissible, must have been made during the continuance of the conspiracy and in furtherance of the object of the conspiracy. *Tofanelli v. United States,* 28 F.(2d) 581 (9th Cir.).

> "The declarations of one conspirator made in furtherance of the conspiracy, and during its existence, are admissible against all members of the conspiracy. . . . But a defendant's connection with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator, made out of the presence of the defendant. There must be proof *aliunde* of the existence of the conspiracy, and of the defendant's connection with it, before such statements become admissible against a defendant not present when they are made. *Glasser v. United States,* 315 U.S. 60 * * *." *Montford v. United States,* 200 F.(2d) 759, 760 (5th Cir.).

> "The Government * * * relying on the doctrine that the declarations of one co-conspirator in furtherance of the objects of the conspiracy made to third parties are admissible against his co-conspirators, *Logan v. United States,* 144 U.S. 263, 36 L.Ed. 429, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner v. United States,* 57 F.(2d) 506 (C.C.A. 10th); and see *Nudd v. Burrows,* 91 U.S.

426, 23 L.Ed. 286. Otherwise, hearsay would lift itself by its own boot straps to the level of competent evidence." *Glasser v. United States,* 315 U.S. 60, 75, 86 L.Ed. 680, 701.

E. The impeachment of the co-defendant was improper and prejudicial to the appellant's case.

In direct examination of the co-defendant by her own counsel, she was asked if she had had "brushes with the law in prostitution and dope" (R. 108). In the cross-examination of this witness this was carried to an unpermissible extent (R. 126-133). Brushes with the law were treated by Government counsel as including mere arrests, detention as a juvenile, *quasi* licenses to practice prostitution (R. 128-129), return to the reform school, parole revocation, etc. The cross-examination was finally stopped by the Court (R. 133), but the damage was done.

While some of the cross-examination might have been proper, that is, where convictions of felony were shown, there was a great deal that was improper. It was not designated to impeach the witness, but to show that she was a person of low and dissolute character. The rule is that acts of misconduct, not resulting in conviction of crime, are not proper subjects of cross-examination to impeach a witness. *Echert v. United States,* 188 F.(2d) 336 (8th Cir.), 26 A.L.R.(2d) 752.

In *Mitrovich v. United States,* 15 F.(2d) 163 (9th Cir.), this Court said:

> "On cross-examination the court permitted counsel for the government to ask the plaintiff in error whether he had not been arrested on one or more previous occasions. An objection to this testi-

mony was interposed and overruled. The witness answered, 'Twice.' The ruling admitting this testimony was, in our opinion, both erroneous and prejudicial. * * * Counsel for the government invokes the rule that a defendant who takes the witness stand in his own behalf waives his constitutional rights, and places himself on the same footing as any other witness, and the further rule that the scope of cross-examination is within the discretion of the trial court. With these rules we have no quarrel, but the question whether a party had been arrested is not a proper question to be propounded to any witness on cross-examination for the purpose of discrediting him, and the mere discretion of the court is not broad enough to justify the admission of testimony which is otherwise manifestly incompetent and prejudicial. The court below sought to justify its ruling upon the ground that the plaintiff in error had gone somewhat extensively into his past history on direct examination, but there was nothing in the direct examination tending even remotely to show that the plaintiff in error had not been arrested for crime. No such question was asked, and no such answer was made. The question propounded on the cross-examination was therefore wholly foreign to anything found in the direct examination."

IV.

THE COURT GAVE ERRONEOUS INSTRUCTIONS TO THE JURY

A. The court did not properly define the crime with which the defendants were charged.

The court correctly stated the law under Sec. 2422 (R. 185), but left the impression that the defendants were charged under that section and not for *conspiracy* to

violate that section. Conspiracy was later defined (R. 187), but the jury was told that the offense was *conspiracy to transport,* not *conspiracy to persuade.* From this the jury could well conclude that if the evidence showed that the defendants conspired together that the co-defendant should be *transported* from Portland to Seattle, then appellant could be found guilty. But this is not so; he could only be convicted if it was shown that he conspired so that the co-defendant was *persuaded* to go.

Of course, under the *Gebardi* case (287 U.S. 112), appellant could not be convicted because the woman, "who by yielding to persuasion, assists in her own transportation," could not be guilty of conspiracy; and the appellant did not conspire with anyone else.

B. The court told the jury that appellant could be convicted without proof, and merely because they found the co-defendant guilty.

The court told the jury:

> "There is no such thing as one conspiring. A person who alone plans and commits a criminal act is not guilty of conspiring." (R. 187)
>
> * * * * * * * *
>
> "You must find both defendants guilty or not guilty in this case, because you cannot find one guilty and the other not guilty." (R. 191)

The vice of the instruction is that while the court talks about guilt, he says nothing about proof. One may be guilty of conspiracy with the proof insufficient, but since we do not have the Scotch verdict of "not proven," the verdict must be not guilty. Here, the jury might have felt the proof sufficient to convict Mrs. Sangahid; although they might have felt that Blassingame equally

guilty, the proof was insufficient. Mrs. Songahid took the stand in her own defense; Blassingame exercised his privilege and remained silent. She might have convicted herself and they might have felt bound to return a verdict of guilty as to her. But under the instructions they had to find Blassingame equally guilty, or acquit both.

These instructions are not taken out of context; they are the only expressions by the court on the subject.

It seems to us the error is one involving fundamentals, the fact that our system of law is the adversary system. Under our system, a person might be guilty to a moral certainty, but if it could not be established by legal proof, there is no guilt in law. The principle was recognized repeatedly by the court when he said that certain evidence was admissible as to only one defendant—until and unless a conspiracy had been established. Now the jury might have felt that Mrs. Songahid did conspire with Blassingame, and the proof was sufficient; but that as to Blassingame the evidence admissible as to him did not establish that he conspired at all.

No exceptions were taken to the instructions and this calls for further comment. Rule 52(b) of the Federal Rules of Criminal Procedure, provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This is a case for the application of the Rule. See Judge Denman's dissenting opinion in *Bentar v. United States,* 209 F.(2d) 734, 743 (9 Cir.).

The court put the question to counsel whether there was any question in their minds whether the verdict

should find both defendants guilty or not guilty; only counsel for the Government answered, and his answer was that there was no question in his mind (St. 215).

It must be remembered that the defendant Songahid was seriously impeached. She had been shown to be a prostitute all her life, started according to the court when she was eleven, brought into prostitution violation of the Mann act when she was sixteen (St. 239), and the impression created upon the jury might have been most unfavorable; instead of pitying her as the court did, they might have felt that she was beyond redemption, and this coupled with her acknowledged narcotics addiction, demanded a guilty verdict. Under the court's instruction they were required to convict Blassingame also. This was a denial of trial by jury.

It is one thing to say that there could be no *conspiracy* without the active concurrence of two or more persons; that is an abstract principle of law with which no one would quarrel; it is quite another matter to say, where the proof is different, that proving the guilt of one establishes the guilt of another. In substance, that is what the judge said here.

It is true, no exceptions were taken to the instructions. But Rule 52(b), Federal Rules of Criminal Procedure, provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. And it is the rule in this Circuit that the court must instruct on all essential questions of law, whether or not it is requested to do so. *Samuel v. United States,* 169 F.(2d) 787, 792 (9th Cir.). In that case this Court said:

> "In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. * * * We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all."

The failure to except to instructions is not fatal to the appeal. In *United States v. Kelinson,* 205 F.(2d) 600, it was held that where the judge promises to give a charge to the jury that the admissions of a co-defendant were not binding on the defendant, after objections to the admission of testimony, failure to except to instructions is not a waiver.

The failure of the conspiracy charge would not prevent the filing of a proper Indictment. In the case of *In re Louie,* 218 Fed. 36 (9th Cir.), it was held that an acquittal on a charge of conspiracy is not a bar to a prosecution for aiding and abetting the commission of an offense against the United States.

CONCLUSION

For the reasons stated, the judgment should be reversed and the charge dismissed.

Respectfully submitted,

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JAMES TYNAN
Attorneys for Appellant

No. 14352

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM BLASSINGAME,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant's statement of the case does not exactly comply with Rule 18(2)(c) of this Court which requires the same to succintly present the questions involved and the manner in which they are raised. Rather, it attempts to detail the case, from a viewpoint most favorable to the appellant, the evi-

dence admitted as to Count I of the Indictment under which the appellant Blassingame and his co-defendant, Patricia Lewis, whose true name was Mary Donna Songahid, were tried and convicted by a jury. The appellant Blassingame was sentenced to four years' imprisonment, and he, alone, appealed, while his co-defendant, Lewis, was placed on probation for three years and did not appeal.

Count I of the Indictment charged the defendants with conspiring to violate the White Slave Traffic Act.

The statute under which Count I of the Indictment was drawn reads as follows: (Title 18, U.S.C.A., Section 371)

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
> * * * *"

The Indictment returned in this case is set forth in Appellant's Brief, p. 4 and 5, and it is conceded that the correct date as contained therein is January 5, 1953.

The appellant, Blassingame, elected not to take the witness stand at the conclusion of the Government's case. The only defense offered by the appellant was that portion of his co-defendant's testimony which might have established a defense for the appellant.

Along about the last of the year of 1952 (R. 22) Sam Blassingame, a colored man, and Pat Lewis, a white woman, who had known one another since 1949 (R. 108) discussed at the home of Mrs. Beulah Smith at 112 7th Avenue, Seattle, Washington, (R. 24) a trip to Portland, Oregon, (R. 25). Pat Lewis told Mrs. Smith she was going to Portland to make some money (R. 26). Mrs. Smith asked to go along with them, but was advised by Sam Blassingame that there would be no colored people where they were going (R. 25). Prior to this time Mrs. Smith had met Pat Lewis and Sam Blassingame at her home, and she knew Pat Lewis to be a prostitute (R. 24). In fact Pat Lewis admitted practicing prostitution during the past five or six years (R. 108).

Pat Lewis admitted going to Portland, Oregon on December 31, 1952, by airplane, and checking in at the Chamberlain Hotel where she kept a room there till she left Portland on January 5, 1953 (R. 108, 109) although only actually staying there one or two

days (R. 141). After arriving at Portland and after some search, Pat Lewis finally located Madison Wilson and Alvina Newman and went to their house to stay (R. 141). Pat Lewis said she never saw Sam Blassingame while she was in Portland (R. 142) until she met him at the airport on January 5, 1953 (R. 109), although she said she heard he had been to the Wilson-Newman home while she was there (R. 142).

At the airport in Portland, Oregon, on January 5, 1953, Pat Lewis and Sam Blassingame met by chance, supposedly. However, flight No. 675 (R. 57) on United Airlines, a common carrier (R. 55) between Portland and Seattle, on January 5, 1953, did not leave Portland for Seattle until 3:45 p. m. (R. 57) and they both, by chance, arrived at the airport at 1:30 or 2:00 p. m. to buy their tickets (R. 58).

Pat Lewis admits she used her own money to buy her own ticket (R. 110). She in fact bought both her ticket and Sam Blassingame's from R. A. Caughey, United Airlines ticket agent, in Portland (R. 56).

Pat Lewis and Sam Blassingame left Portland at 3:45 p. m. on January 5, 1953 on United Airlines flight No. 675 and arrived at the airport in King

County one hour later (R. 57, 58). They both took the same cab from the airport to an address near Jackson Street in the City of Seattle, where Blassingame got his own personal car and drove Pat Lewis to her apartment at 3009½ E. Spruce Street, Seattle (R. 100). By 1:00 a.m. January 6, 1953, Pat Lewis had by her own admission performed three acts of prostitution (R. 150, 151) even though she stated that her purpose for returning to Seattle was *not* to work as a prostitute. She was then arrested by Seattle Police officers for prostitution, and while being booked at the City Jail attempted to destroy the United Airlines flight No. 675 ticket stubs for "Mr. and Mrs. Blassingame" which she had previously purchased in Portland, Oregon for the reason as she said that they might incriminate Sam Blassingame (R. 101). She was subsequently released from jail on January 9, 1953 (R. 112).

On January 21, 1953, Sam Blassingame rented under the name of Robert Morris a house at 724 22nd Avenue South, Seattle, Washington. (This was established by Chas. H. Winston's testimony which apparently was inadvertently omitted from the printed record.) Approximately three or four days prior to this, Sam Blassingame persuaded Patsy Ruth McCandless, a colored girl, to engage in prostitution and took her to 724 22nd Avenue South, where she met Pat

Lewis, and it was explained to Mrs. McCandless by Blassingame what she was to do as a prostitute (R. 71-77). Pat Lewis acted in charge of the house admitting the men into the house and doing various other things as well as practicing prostitution there herself, turning some money that she, Pat Lewis, earned while she was working there, over to Blassingame, and Patsy McCandless turned all of her money over to Blassingame on the average of $60.00 to $70.00 per night.

I

ARGUMENT ON SPECIFICATION OF ERROR No. 1

The argument of appellant on Specification of Error No. 1 relates to the charge in the Indictment that one cannot conspire to persuade oneself, and therefore, it does not charge a crime.

The offense charged in the Indictment is one of conspiracy to commit an offense against the United States, and the language of Count I is sufficient to charge a crime under Title 18, U.S.C., Section 371.

The language in *U. S. v. Holte,* 236 U.S. 140, wherein Mr. Justice Holmes delivers the opinion of the Court, commences with the following statement:

> "This is an indictment for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported from Illinois to Wisconsin for the purpose of prostitution, * * *."

Certainly the Indictment in its entirety in the instant case covers all the requirements suggested by the Supreme Court in the *Holte* case.

This Court has stated in *Miller v. U. S.*, 95 F. 492, that it is possible for a female victim to be guilty of conspiring to violate the White Slave Traffic Act.

Appellant contends strongly that the indictment, in charging that the appellant and Patricia Lewis, the codefendant, "did conspire and agree together, and with each other, to commit an offense against the United States, that is to knowingly and unlawfully, and in violation of Title 18, U.S.C., Section 2422, cause the said Patricia Lewis, alias Pat Lewis, to go in interstate commerce . . ." is insufficient in that it charges instead a conspiracy to commit an offense under Title 18, U.S.C., Section 2421. The appellant urges that the two offenses under the statute are "distinct and separate, and an indictment under one section will not support a conviction under the other." (Appellant's Brief, p. 12).

However, it is urged by the government that admitting for the purpose of this argument that the citation in the Indictment should have referred to a conspiracy to commit the related offense under Title 18, U.S.C., Section 2421, the Indictment is not insufficient since it informs both defendants of the charge and does not tend to mislead them. Error in the citation or its omission shall not be grounds for dismissal of the Indictment or Information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice. *Federal Rules of Criminal Procedure*, Section 7(c).[1]

The cases relied on in support of Rule 7(c) above unquestionably show the rule followed in the United State Supreme Court. In *Williams v. United States*, 168 U.S. 382, 18 S. Ct. 92, 42 L.Ed. 509, where a port inspector was convicted of extortion and appealed on

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[1]The revisers of the Federal Rules state that "the law at present regards citations to statutes or regulations as not a part of the indictment. A conviction may be sustained on the basis of a statute or regulation other than that cited . . . The provision of the rule, in view of the many statutes and regulations, is for the benefit of the defendant and is not intended to cause a dismissal of the indictment, but simply to provide a means by which he can be properly informed without danger to the prosecution." Citing *Williams v. United States*, 168 U.S. 382, 389, 18 S. Ct. 92, 42 L.Ed. 509; *United States v. Hutcheson*, 312 U.S. 219, 229, 61 S. Ct. 463, 85 L.Ed. 788.

the grounds, *inter alia*, that the Indictment did not correctly cite the statute under which he was convicted, the court held that the indorsement on an Indictment of the statute under which it is drawn is no part of the Indictment, which is sufficient if it charges an offense under *any statute*. The court states (at p. 94) that:

> "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment, and does not add to or weaken the legal force of its averments. We must *look to the indictment itself*, and *if it properly charges an offense under the laws of the United States, that is sufficient to sustain it*, although the representative of the United States may have supposed that the offense charged was covered by a different statute." (Emphasis supplied)

In the later case of *U. S. v. Hutcheson*, 61 S. Ct. 463, 312 U.S. 219, 85 L.Ed. 788, the court, citing *Williams v. U. S. supra*, said that in determining whether an Indictment charges an offense, the pleader's designation of a statute purporting to support the charge is immaterial, since *the charge, though not sustained by that statute, may come within the terms of another*. The court stated (at p. 229):

> "In order to determine whether an indictment charges an offense against the United States, *designation by the pleader of the statute under*

> *which he purported to lay the charge is immmaterial.* He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute." (Emphasis supplied).

This court has followed the rule, relying upon *Williams v. U. S., supra,* and held that the Indictment need not state the particular section of the law violated by the accused. *Smith v. Johnston,* 83 F. 2d 331 (C.C.A. 9th 1936). In that case where the accused was indicted for receiving stolen cigarettes from an interstate carrier and contended that the Indictment was insufficient because the correct section of the statute was not cited, this court said (at p. 321):

> "Appellant claims that the indictment was insufficient because it did not state the particular section of the law which he had violated. *This was unnecessary. Williams v. United States,* 168 U.S. 382, 389, 18 S.Ct. 92, 42 L.Ed. 509; *Taylor v. United States* (C.C.A.) 2 F. 2d 444, 446." (Emphasis supplied).

This court earlier had held that the *statute* on which an indictment is found is *determinable as a matter of law from the facts charged,* although the statute is not mentioned, and *Indictment is brought under another statute. Vedin v. U.S.,* 257 Fed. 550 (C.C.A. 9th 1919). Similarly, the District Court for the Western District of Washington has held in *United States v. Lucas,* 6 F. 2d 327, that an Indictment

based on the wrong statute is immaterial if it constitutes an offense.

Under the authorities cited above, the recitation of Title 18, U.S.C., Section 2422 in the Indictment is not fatal where the Indictment sufficiently charges a conspiracy under Title 18, U.S.C., Section 371 to violate Title 18, U.S.C., Section 2421 or 2422. The evidence produced at the trial and the instructions of the court to the jury were sufficient to sustain the finding of guilty under the Indictment.

It is the contention of the appellant that the Indictment is insufficient in another particular, *viz.*, that the appellant is not charged with conspiring with the co-defendant or "anyone else to persuade or entice or induce her to go" in interstate commerce; "and that is the offense which is punishable by the statute under which he is charged." (Appellant's Brief, p. 14). This contention is unsound. The Indictment charges that the appellant and the co-defendant "did conspire and agree together, and with each other, to commit an offense against the United States, that is, to knowingly and unlawfully * * * cause the said Patricia Lewis . . . *to go in interstate commerce* from Portland, Oregon to Seattle, Washington, *with the intent and purpose* on the part of said Sam Blassingame and Patricia Lewis *that the said Patricia Lewis should engage in the practice of prostitution* and that

said defendants did *knowingly cause said Patricia Lewis to go and be carried as a passenger upon the line of a common carrier*, to-wit, United Airlines, in the said interstate commerce." (R. 3). (Emphasis supplied). The gist of the crime here charged is the *conspiracy*—the conspiracy to violate a law of the United States, *viz.*, the White Slave Traffic Act which makes it an offense for any person to *knowingly transport in interstate* or *foreign commerce* "any *woman* or *girl for the purpose of prostitution* or debauchery, or for any other immoral purpose, *or* with the intent and purpose to induce, entice, or compel such woman or girl to give herself up to debauchery, *or* to engage in any other immoral practice; *or*

"Whoever knowingly procures or obtains any ticket . . . or any form of transportation . . . to be used by any woman or girl in interstate or foreign commerce . . . *in going to any place* for the purpose of prostitution, or for any other immoral purpose, *or* with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, *whereby any such woman or girl shall be transported in interstate or foreign commerce* . . ." Title 18, U.S.C., Section 2421. (Emphasis supplied).

This court sustained a conviction on substantially the same facts where it was urged by appellant that the conspiracy indictment failed to state an offense because there was no allegation of joint intent. In *Corbett v. U. S.*, 299 Fed. 27 (C.C.A. 9th 1924), the court said (at p. 30):

> "It is argued that the conspiracy indictment fails to state an offense because there is no joint intent alleged. The point is not well founded as the indictment distinctly alleges that the defendants Corbett and Nora E. Bishop, alias Ellen Stone, wilfully, knowingly, unlawfully and feloniously conspired and agreed together to commit an offense against the United States, to-wit, to violate the act of Congress known as the White Slave Traffic Act (Act June 25, 1910, 36 Stat. 825) in the 'following manner and particulars.' *Pierce et al v. United States*, 252 U.S. 239, 244, 40 Sup. Ct. 205, 64 L.Ed. 542. With considerable detail the indictment then alleges an agreement that Nora E. Bishop should be transported from Spokane, Wash., to Boise, Idaho, and that Corbett should knowingly transport and aid in transporting her from Spokane to Boise as a passenger upon a line of a common carrier, the name of which is given, with intent and purpose on the part of Corbett to induce, entice, and procure Nora E. Bishop to give herself up to debauchery and other immoral practices. Several overt acts are alleged. *United States v. Holte*, 236 U.S. 140, 35 Sup. Ct. 471, 59 L.Ed. 504, L.R.A. 1915D, 281."

Similarly, this court in *Hoffman v. U. S.*, 87 Fed. 2d 410 (C.C.A. 9th 1937) sustained a conviction for the substantive offense the appellant and co-defendant

are here charged with conspiring to commit where it was charged that the defendant "caused and aided a woman * * * to be carried in interstate commerce * * * for the purpose of debauchery and for the immoral purpose of sexual intercourse * * * over the lines and routes of named Greyhound Lines."

The essential elements of an offense under the Mann Act are knowingly transporting in interstate commerce a woman for the purpose of prostitution or debauchery or any other immoral purpose. This court has so held where the defendant was convicted for knowingly causing a woman to be transported from Seattle, Washington, to Portland, Oregon. *Tedesco v. U. S.* 118 F. 2d 737 (C. C. A. 9th 1941). *Accord*: *Ellis v. U. S.*, 138 F. 2d 612 (C.C.A. 8th 1943); *Masse v. U. S.*, 210 F. 2d 418 (C.C.A. 5th 1954).

Appellant relied strongly on *Gebardi v. U. S.*, 287 U.S. 112, 53 S.Ct. 35. 77 L.Ed. 206, 84 A.L.R. 370, to support his contention that "the woman who aids or assists in her own transportation is not guilty of a violation of the Mann Act" and "it follows that she cannot be guilty of conspiriing to do so." (Appellant's Brief, p. 14). This contention is unsound. A close reading of the opinion in the *Gebardi* case will reveal that the decision is restricted to its facts. The court held that *mere agreement* on the part of the of the

woman to her transportation in interstate commerce and its immoral purpose does not render her punishable as a coconspirator to violate the act. Incapacity of one to commit a substantive offense does not necessarily imply that he may with impunity conspire with others who are able to commit it. *Gebardi v. U. S. supra.*

In a case where a woman was cited for contempt for refusing to answer questions to the grand jury concerning her relations and travel with a man, the subject of an investigation for violation of the Mann Act, on the ground of self-incrimination, this court held that there was no evidence that this particular woman would subject herself to criminal liability under the Mann Act. *Miller v. U. S., supra.* The court said (at p. 494) that:

> "*A woman transported in violation of the* (Mann) *act* may, conceivably, *be guilty of conspiring* with the person transporting her to violate the act * * * Whether there was or was not a reasonable probability that appellant's answers would have shown or tended to show her participancy in such a conspiracy was a question of fact to be determined upon the evidence received at the trial." (Emphasis supplied).

In *Corbett v. U. S., supra,* where the defendant was indicted in one count for transportation of his codefendant in interstate commerce from Spokane, Washington, to Boise, Idaho, with the intent and pur-

pose to induce, entice and compel her to engage in illicit relations, *both the defendant and his codefendant were convicted of conspiracy to effect the transportation charged in the first count. Corbett v. U. S., supra.*

An indictment for conspiracy to commit an offense need only identify such offense. *Wong Tai v. U. S.*, 47 S. Ct., 300 273 U.S. 77, 71, L.Ed. 35 (1927). While the essential elements of a substantive offense must be charged with particularity, this is not necessary when conspiracy is charged. *U. S. v. Walburg*, 47 F. Supp. 352 (S.D. Cal. 1942).

Every intendment must be indulged in support of an indictment after verdict. *Coates v. U. S.*, 59 F. 2d 173 (C.C.A. 9th 1932). This court stated (at p. 174) that:

> "Every ingredient and element of the conspiracy is clearly set out and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States, supra,* 157 U.S. 286, 290, 15 S. Ct. 628, 630, 39 L.Ed. 704 * * * The conspiracy need not be charged with the same particularly as substantive offenses."

True, the plan of the conspiracy must be found in the clause in the Indictment which sets it forth,

however, the overt acts may be looked at to ascertain the sense in which terms are used and for the purpose of interpreting doubtful terminology in the charging clause. *Stearns v. U. S.*, 152 Fed. 900; *U. S. ex rel Semel v. Fitch*, 66 F. Supp. 206. When the Indictment in this case is read in its entirety, there is no uncertainty; nothing is left to conjecture and the appellant was completely apprised of the charge upon which he was tried and convicted.

Appellant has failed to bear in mind that the crime of which he was found guilty was one of conspiracy, which provides for its own penalties, its own essential elements of proof, and its own rules of evidence and procedure.

The charge here is one of conspiracy. The crime under the statute is for "two or more persons" to "*conspire to commit any offense against the United States*, and for *one or more* of such persons *to do any act* to *effectuate the object of the conspiracy.*" Title 18, U.S.C., Sec. 371.

Appellant apparently attacks the sufficiency of the Indictment. The Rules of Criminal Procedure provide that "The Indictment or the Information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged," Rule 7(c). Under Rule 58 of The Rules

of Criminal Procedure, illustrative forms of Indictments are appended. The forms reveal a simplicity of statement which indicates to the defendant (or defendants) the nature of the act or offense and the time and place where the act occurred.

Here the Indictment meets the requisites of certainty as demanded by this Court, the Supreme Court of the United States, and the Circuit Courts.

The gist of the crime here charged is one of *conspiracy*—the conspiracy to commit an offense against the United States, viz., to violate the White Slave Traffic Act. An Indictment for conspiracy to commit an offense need only identify such offense. *Wong Tai v. United States*, 47 S.Ct. 300, 273, U.S. 45, 71 L.Ed. 545 (1927). While the essential elements of a substantive offense must be charged with particularity, this is not necessary when conspiracy is charged, *United States v. Walburg*, 47 F. Supp. 352 (S.D. Cal. 1942). The act of conspiracy is the gist of the crime and only certainty as to a common intent is necessary. *Williams v. United States*, 18 S.Ct. 92, 168 U.S. 382, 42 L.Ed. 509. Every intendment must be indulged in support of Indictment after verdict. *Coates v. United States*, 59 F. 2d 173 (C.C.A. 9th 1932).

In the case of *Corbett v. U. S.*, 299 Fed. 27, 29 (C.A. 9) this court held sufficient an indictment in which the defendants "willfully, unlawfully and feloniously to commit an offense against the United States, to-wit, to violate the act of Congress known as the White Slave Traffic Act in the following manner and particulars * * *."

The sufficiency of criminal proceedings in the Federal Courts is determined by practical rather than technical considerations. This Court expressed that view in *Hopper v. U. S.*, 142 F. 2d 181 (C.A. 9) where the defendant was indicted for failure to perform duty required under the Selective Service Act in failing to report as a conscientious objector. The Court said (at p. 184):

> " * * * The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction' * * *."

This Court reaffirmed this view in the later case of *Rose v. United States*, 149 F. 2d 755 (C.C.A. 9th 1945) where the defendants were convicted of conspiracy to commit offenses against the United States

in selling and transferring new rubber tires in violation of Statute, Executive Orders, Regulations and Directives. In overruling the contention of the appellants that the Indictment was insufficient, the Court said (at p. 758):

> "The sufficiency of an indictment must be determined on the basis of practical rather than technical considerations. *Hopper v. United States*, 9 Cir., 1944, 142 F. 2d 181, 184; *Marin v. United States*, 4 Cir., 1924, 299 Fed. 287, 288. It is not the law that to charge conspiracy to commit an offense, all the elements need be precisely alleged. *Wong Tai v. United States*, 1927, 273 U.S. 77, 81, 47 S. Ct. 300, 71 L.Ed. 545; *Williamson v. United States*, 1908, 207 U.S. 425, 447, 28 S.Ct. 163, 52 L.Ed. 278. This court has held that: 'The essence of the crime of conspiracy is the unlawful combination, and if the object of the conspiracy is the accomplishment of some unlawful act, the means by which the unlawful act is to be accomplished need not be set forth in the indictment.' *Proffitt v. United States*, 9 Cir., 1920, 264 Fed. 299, 302. In the instant case a fraudulent conspiracy to transfer rubber tires and tubes in violation of rationing regulations is charged, the terms of the applicable regulations are mentioned in the indictment, and overt acts in furtherance of the object of the conspiracy are therein set forth. These allegations are sufficient."

So long as the Indictment for conspiracy is sufficient to inform the defendants of the charge against them, it is sufficient where the Indictment alleges an agrement to do an unlawful act and the means by

which that agreement was achieved. *Schino v. United States*, 209 F. 2d 67, 69, (C.C.A. 9th, 1953). *United States v. Falcone*, 311 U.S. 205, 210, 61 S.Ct. 204, 85 L.Ed. 128. The test of the sufficiency of an Indictment is "whether it contains such a plain, definite and certain statement of essential facts to enable him to fully prepare his defense and plead jeopardy." *United States v. Pruitt*, 121 F. Supp. 15, 20 (S.D. Tex. 1954). We must look to the Indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it. *Williams v. United States*, *supra*.

II
ARGUMENT ON SPECIFICATION OF ERROR No. 2

The argument of appellant on Specification of Error No. 2 seems to contend that there was no proof of any conspiracy in the case.

Reference is made to portions of the material advanced in the foregoing argument where pertinent, and to the following:

There are two leading cases on the question of whether a woman can be convicted in a conspiracy with another to violate the White Slave Traffic Act. These cases are *U. S. v. Holte*, *supra*, and *Gebardi v.*

U. S., supra. Both these cases answer the question in the affirmative. Neither has been overruled, both are presently being cited as current authority.

The *Holte* case positively answered the question, while the *Gebardi* case in answering the question affirmatively made certain qualifications and placed certain restrictions on its answer, but bear in mind the question is still answered "yes".

The appellant has referred to the *Corbett v. U. S.* case, supra, decided after the *Holte* case but prior to the Gebardi case, by the Ninth Circuit and which the Government feels is controlling as to the instant case, although the *Corbett* case is not nearly as strong on its facts as the instant case.

Counsel for the appellant has referred to the case of *U. S. v. Holtz,* 103 F. Supp. 191, which was appealed only as to the defendant Martin and is reported as *U. S. v. Martin,* 191 F. 2d 569, (C.C.A. 7) but likewise that case is distinguishable from the instant case on the facts and by the further reason that in the instant case the jury has considered all the facts, whereas in *U. S. v. Martin,* supra, the Court heard the facts and decided on the issues.

A conspiracy may be sustained by evidence showing concert of action in the commission of the unlawful act or by proof of other facts from which natural

inference arises that the unlawful acts were in furtherance of a common design. *U. S. v. Holt*, 108 F. 2d 365; *U. S. v. Glasser*, 116 F. 2d 690; *Reavis v. U. S.*, 106 F. 2d 982.

The proposition that one co-defendant being immune from prosecution alone as to a certain crime and therefore could not be convicted of a conspiracy to violate that crime has been rejected. *U. S. v. Robinowich*, 238 U.S. 78; *Farnsworth v. Zerbst*, 98 F. 2d 541; *Hemans v. U. S.*, 168 F. 2d 228; *May v. U. S.*, 175 F. 2d 994.

A woman who is the subject of transportation in interstate commerce for purposes of prostitution may be guilty of a conspiracy to violate the provisions of the White Slave Traffic Act. *U. S. v. Holte, supra; Gebardi v. U. S., supra.*

This proposition came into effect prior to 1915, and the decision in the *Holte* case, but with that decision it was made a part of our law and is still in existence and followed; the *Holte* case, being cited as authority as recently as *Brown v. U. S.* (1953) 204 F. 2d 247, wherein it was stated at page 250:

> "The evidence established and the jury found that appellant was the prime mover in this system of extortion. It was carried on at his direction, for his benefit and for a considerable period of time. The fact that the appellant was a private citizen and legally incapable of violating Sec. 242

> does not render him immune from the charge of violating 18 U.S.C. 371 by engaging in an agreement with a law enforcement officer acting under color of the State law to violate 18 U.S.C. 242. *U. S. v. Holte*, 236 U.S. 140 * * *."

The *Holte* case is still authority in the Ninth Circuit. It was cited as authority in *Corbett v. U. S.*, supra, decided in 1925. It was further cited as authority in the case of *Miller v. U. S.*, supra, wherein it is stated at page 494:

> "It must be and is conceded by appellant that, whatever her answers might have been, they could not have tended to show a violation by her of the White Slave Traffic Act, 18 U.S.C.A., Sec. 397, et seq. That act does not punish a woman for transporting herself. Though she may be the willing object of such transportation, still, if she does not aid or assist otherwise than by her consent, she does not violate the act. *Gebardi v. U. S.*, 287 U.S. 112 * * *.
>
> "The only federal offense of which it is claimed appellant's answers might have contended to prove her guilty is that of conspiring to violate the White Slave Traffic Act. A woman transported in violation of the act may, conceivably, be guilty of conspiring with the person transporting her to violate the act. *U. S. v. Holte*, 236 U.S. 140 * * *.
>
> "It cannot, however, be said that appellant's answers, if she had answered, must necessarily have tended to show her participancy in such a conspiracy. Assuming the questions to have been answered in a manner most damaging to Jackson, the person under investigation, it still does not follow that such answers would have shown a conspiracy by appellant with Jackson to violate

the act. Such answers might well have shown mere acquiescence on her part, which alone, would not suffice to prove either a violation by her or a conspiracy by her to violate the act. *Gebardi v. U. S.*, supra.

"Whether there was or not a reasonable probability that appellant's answers would have shown or tended to show her participancy in such a conspiracy was a question of fact to be determined upon the evidence received at the trial. Not having the evidence before us, we could not say that it showed any such reasonable probability. It may, for all we know, have shown affirmatively and conclusively that there was neither probability nor possibility that appellant's answers would or could have any such effect. It may, as already suggested, have shown that appellant merely consented to or acquiesced in the illegal transportation of herself, or it may have shown that she did not consent or acquiesce, but was forcibly and violently abducted and transported from California to Oregon."

It is apparent from the *Miller* case, supra, just referred to, that this Circuit recognizes the proposition that a woman, also the subject, may be guilty of a conspiracy to violate the White Slave Traffic Act, and that it is still the controlling law in this district.

In the *Holte* case, supra, the Court, in passing upon the proposition under discussion stated:

"We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is im-

possible for the transported woman to be guilty of a crime in conspiring as alleged."

The Court, after considering the words of the statute and the analagous cases, finally stated:

> "So we think that it would be going too far to say that the defendant could not be guilty in this case. *Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, — she would be within the letter of the act of 1910, and see no reason why the act should not be allowed to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach,* if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime. The substantive offense might be committed without the woman's consent, for instance, if she were drugged or taken by force. Therefore, the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them, do not apply." (Italics ours)

The appellant has relied on the case of *Gebardi v. U. S.*, supra, but has misconstrued the holding therein. This case does not definitely decide that if the woman merely consents to the transportation or to go in interstate commerce for immoral purposes she cannot

be guilty of conspiracy to violate the act and certainly the case does not hold that if the woman does more than merely consent or acquiesce in the transportation for immoral purposes she cannot be guilty of the conspiracy to violate the act. In the *Gebardi* case, supra, at the bottom of page 117, the Court said:

> *"There is no evidence that she purchased the railroad tickets or that hers was the active or moving spirit in conceiving or carrying out the transportation. The proof shows no more than she went willingly upon the journeys for the purposes alleged."* (Italics ours)

Again, on page 123:

> "We place it rather upon the ground that we perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her *mere consent*, evidence of an affirmative legislative policy to leave *her acquiescence* unpunished."
> (Italics ours)

In both the *Holte* and *Gebardi* cases, supra, it can wisely be cautioned that whether or not the proposition is applicable to any particular case, seems to depend entirely upon the exact facts of the case in question.

In the instant case Pat Lewis was the active and moving spirit in conceiving the transportation. Here, in the instant case, the evidence indicates that the co-defendant, Pat Lewis, deliberately planned to go

to Portland, went to Portland, met the appellant, Sam Blassingame, that she used her money to buy her ticket; that she bought tickets from the ticket agent; that she purchased the tickets in the name of "Mr. and Mrs. Blassingame"; that she rode in appellant Sam Blassingame's personal automobile from Jackson Street to 3009½ E. Spruce Street; that she went to her apartment at 3009½ E. Spruce Street; that she during all this time wanted to practice prostitution; that she in fact did practice prostitution within six hours after her arrival at 3009½ E. Spruce Street; and that she "knew what she was doing."

Further, the evidence shows that she intended to destroy the names of "Mr. and Mrs. Blassingame" on the ticket receipts; that she stated her reason for her actions to be: "She didn't want to incriminate Sam Blassingame"; that she acted as a "madam" at the house at 724 22nd Avenue South, which Blassingame rented under an assumed name, and where Patsy McCandless practiced prostitution.

In 42 Am. Jur., Prostitution, Section 18, page 273, the principle is presented as follows:

> "The rule that an agreement to commit an offense which can be committed only by the concerted action of the persons to the agreement, does not amount to a conspiracy, does not in all strictness apply where the woman is charged as coconspirator with the man for violation of the

White Slave Traffic Act. The circumstances may be such that she may be guilty of a conspiracy to violate the provisions of the penal code relating to conspiracy to commit offenses against the United States apply to the offense created by the White Slave Traffic Act. and that consequently the woman subjected to unlawful interstate transportation may, if a guilty participant, be indicted as a co-conspirator with the person causing her to be transported."

III

ARGUMENT ON SPECIFICATIONS OF ERROR NOS. 3, 4, 5, 6 AND 7

The argument of appellant on Specifications of Error Nos. 3, 4, 5, 6 and 7 claims the trial court erred in admitting certain evidence, to-wit: Exhibits 1 and 2, the United Airline ticket stubs of "Mr." and "Mrs." Blassingame; the declarations of a co-conspirator made in the absence of the appellant; the declarations which imputed to the appellant the commission of other crimes; testimony admitted for the purpose of establishing intent; and improper impeachment of the co-defendant.

Concerning the admission into evidence of the two ticket stubs, Exhibits 1 and 2, the appellant's argument, if it can be called that for the purpose of this statement, recites no reason why they should have been excluded from the evidence, unless he hasn't read the record in the case, because without a doubt they

are connected with the appellant from the first moment they were sold by the witness Caughey to the co-defendant, Lewis, and to the appellant who was with her on January 5, 1953 at Portland, Oregon (R. 55, 56), these were the same ticket stubs recovered from the co-defendant, Lewis, on January 6, 1953 (R. 37, 38).

Appellant argues that statements of a co-conspirator made in the absence of the other co-conspirator are not admissible. Clearly that is not the law.

In the instant case the trial court was careful to instruct the jury with respect to these declarations (R. 21, 22, 33, 36, 37, 47, 65, 72, 77, 78, 79, 98, 183, 184, 185, 186), and a review of these instructions throughout the Government's case, and at the conclusion of the case in the Court's general charge to the jury, the rule of law on this question was constantly and properly before the jury.

Declarations of confederates are not confined to prosecutions of conspiracy. *U. S. v. Olweiss*, 138 F. 2d 798 (C.A. 2).

Appellant is confused by the rule that proof of an accused's *connection with a conspiracy* cannot be established by the acts and declarations made by co-conspirators in his absence; and that before he can be bound by the acts and declarations of his co-con-

spirators, both the conspiracy and the accused's participation therein must be established. *Glasser v. U. S.*, 315 U.S. 60; *Wiborg v. U. S.*, 163 U.S. 632. This was the Court's constant reminder and instruction to the jury.

The appellant and his co-defendant, Lewis, were not arrested for this crime, as he would lead you to believe, on January 6, 1953. The complaint in this case was not filed until December 3, 1953 (R. 101), and their arrest made subsequent to that date, even though constant reference to the arrest date of the co-defendant, Lewis, by the Seattle Police Department on a local community offense on January 6, 1953, is urged by the appellant in his brief as the arrest date in the instant case.

Appellant urges as error, the admission of the witness McCandless' testimony. It clearly was admissible on the question of intent as applying not only to the appellant but as to his co-defendant, Lewis, as well. Intent is a necessary ingredient of the crime of conspiracy and it was vital for the Government to prove the same as to both defendants. Intent may rest on inference, but facts must be proved that give rise to the inference. *U. S. v. Reginelli*, 133 F. 2d 595; *Langford v. U. S.*, 178 F. 2d 48 (C.A. 9). Acts and declarations, both before and after the crime charged

are admissible for the purpose of proving intent. *Hall v. U. S.*, 235 F. 869 (C.A. 9); *Lawrence v. U. S.*, 162 F. 2d 156 (C.A. 9); *Aplin v. U. S.*, 41 F. 2d 495 (C.A. 9).

The appellant further complains that his co-defendant was improperly impeached by the cross-examination of government counsel, and therefore that is reversible error as far as he is concerned. This is a novel proposition of law and counsel cites no authority for it at all. The cases cited by the appellant make for additional reading but lend no aid to the reasoning for advancing this claimed error.

Originally, the matter was opened by counsel for the co-defendant, Lewis, who in no way represented the appellant in any of the proceedings connected with the instant case.

(Witness: Mary Donna Songahid, also known as Patricia Lewis) (R. 108).

Direct examination.

By Mr. Prim:

Q. Now, you have had brushes with the law in prostitution and dope, isn't that correct?

A. Yes.

Q. And when? [146]

A. Here in the last five or six years.

Q. In Seattle?

A. Yes.

Q. And you have been convicted of prostitution and dope, isn't that right?

A. Yes.

The questions propounded above were leading in form, so that it could not be argued that the witness didn't understand the question and volunteered something that would tend to open the door to a line of inquiry not desired by the defense, but obviously counsel for the co-defendant wanted both matters before the jury, that is "brushes with the law" as well as "convictions."

Counsel for the Government on cross-examination then inquired into both of these matters, and counsel for the co-defendant did not see fit to object until the matters had been fairly well covered. The first time that he did object (R. 132) the Court sustained the objection and counsel for the Government went on to another subject (R. 133).

Appellant argues to this Court now, that the foregoing constituted error as to him. It may very well have been that the attorney for the co-defendant, Lewis, had some object in mind for allowing the cross-examination into these matters to continue until he saw fit to enter an objection, which he did at a point in the cross-examination when he, as an experienced trial lawyer, thought it would be in the best interests of his client to do so.

IV
ARGUMENT ON SPECIFICATIONS OF ERROR No. 8(a)(b)

The argument of appellant on Specifications of Error 8(a) and 8(b) now urges error in the Court's instructions regarding the definition of the crime for which the appellant and his co-defendant were being tried, and the proper kind of verdict to be returned.

No requested instructions were submitted by the appellant or his co-defendant. No exceptions to the Court's instructions were noted by the appellant or his co-defendant. The trial court gave additional safeguarding instructions to the jury other than those requested by the appellant or his co-defendant. All counsel agreed that the verdict should be "guilty" or "not guilty" as to both the appellant and his co-defendant.

The Indictment in this case charged a crime of conspiracy against two persons only, the appellant and his co-defendant, thus if one were found guilty and the other acquitted, no conspiracy would exist, because one cannot conspire with oneself to commit the crime of conspiracy. 11 Am. Jur., p. 560, Sec. 26.

V

ARGUMENT ON SPECIFICATIONS OF ERROR NOS. 9 AND 10

Appellant's brief did not separately refer to these particular specifications, but touched upon them generally through his argument on the other specifications. Therefore the appellee will not refer to them particularly other than to urge that they have been sufficiently treated in other portions of this argument.

CONCLUSION

It is respectfully submitted that the evidence in this case as against the appellant is as strong as might be imagined to show a violation of the act charged in the Indictment. It is further submitted that the Ninth Circuit still recognizes and applies the rule set forth in the *Miller v. U. S.*, case, supra.

It is further respectfully submitted that the law definitely contemplates that a conspiracy may exist between a prostitute and another person to commit a violation of the White Slave Traffic Act even though the woman that goes in interstate commerce be the instrumentality for carrying into effect the purpose of the conspiracy, for the conspiracy is the *crime.*

It is further respectfully submitted that the verdict of the jury based upon the conflicting testimony

introduced at the time of the trial was fully supported by the evidence and should be viewed in its most favorable light to the Government.

It is further respectfully submitted that the verdict of guilty as found by the jury is in concurrence with both the evidence and the law and that the conviction below should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

RICHARD D. HARRIS
Assistant United States Attorney

No. 14352

United States Court of Appeals

For the Ninth Circuit

SAM BLASSINGAME, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from Judgment and Sentence in the United States District Court for the Western District of Washington, Northern Division

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

In their brief counsel for the government advance some rather extreme views. One of these is that in a prosecution for conspiracy such liberality is allowed that the indictment may charge a conspiracy to commit an offense against the United States by violating a particular statute, and then a conviction be sustained by showing a violation of *any* statute (p. 9).

This, of course, is not the rule. The indictment must identify the offense. *Wong Tai v. United States,* 273 U.S. 45, 47 S.Ct. 300, 71 L.ed. 545. In that case the supreme court said:

> "It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, * * * or to state such object with the detail which would be required in an indictment for committing the substantive of-

> fense. * * * In charging such a conspiracy 'certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.' *Williamson v. United States,* 207 U.S. 425, 447, 52 L.ed. 290, 28 S.Ct. 163; *Goldberg v. United States,* 277 Fed. 213."

In the case at bar the indictment seems to have been designed to conceal from the appellant the nature of the offense with which he was charged. Upon the facts in possession of the government he could have been charged with the substantive offenses of transporting the female and/or procuring the ticket or tickets under 18 U.S.C.A., §2421, or of inducing her to go under §2422. But instead he was charged with conspiracy, not to commit any of the substantive offenses under §2421, but the offense of persuasion under 18 U.S.C.A., §2422. This was a deliberate choice on the part of the government as is evidenced by the fact that the defendants were charged with going on the line of a common carrier. If the violation was of §2421 the specification of a common carrier would have been unnecessary. In *United States v. Saledonis* (2nd Cir.) 93 F.(2d) 302, it was said:

> "Section 2 of the act [now §2421] provides punishment for anyone who knowingly transports, or causes to be transported, or aids or assists in obtaining transportation for, or in transporting in interstate commerce, any woman or girl for immoral purposes, or who knowingly obtains or causes to be procured or obtained, or aids or assists in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of a right thereto, for the movement in interstate commerce of a woman or girl for the immoral purposes re-

> ferred to in the statute. Transportation referred to in section 2 may be either by public or private carrier as long as it involves crossing state lines. But section 3 makes the offense the offering of an inducement by one who shall 'thereby knowingly cause' such woman to go on a common carrier, in interstate commerce. Thus there are two distinct crimes set forth in the statute. The act condemns transportation obtained or aided or transportation induced in interstate commerce for immoral purposes. * * * Section 2 makes it a felony to obtain or aid transportation for immoral purposes. Section 3 makes it a separate offense to induce a woman to go in interstate commerce on a common carrier for immoral purposes."

Moreover, the indictment charges the defendants with conspiring to "cause said Patricia Lewis to go and be carried as a passenger upon the line of a common carrier." These words are appropriate only under §2422. Under §2421 the offense lies in the transportation or procuring the ticket or tickets.

In *Graham v. United States,* 154 F.(2d) 325 (C.A. D.C.) the defendants were charged with *conspiracy* to "transport and cause to be transported * * * divers women" in the District of Columbia. The court said this was the substantive offense described in Section 2 of the act (§2421). The evidence showed that the women took taxicabs in keeping appointments made for them by the defendants for the purpose of prostitution in the city of Washington. The court said:

> "In our opinion they did not conspire to 'transport or cause to be transported.' The quoted words like most others, have no precise and invariable meaning. They might be used in so broad a sense

as to cover what the appellants did. But they were not so used in §2 of the Mann Act. This becomes clear when §2 is compared with §3. Section 3 makes it a crime to 'induce * * * any woman or girl to go from one place to another' and 'thereby knowingly cause (her) to be carried or transported as a passenger upon the line or route of any common carrier,' in interstate commerce or in the District of Columbia, etc., for the purpose of prostitution. We think Congress had a purpose in enacting §3. But if, as the government in effect contends, §2 covers mere inducement to travel for the purpose of prostitution when the prostitute is likely to and does get transportation for herself, then §3 serves no purpose because §2 covers every case to which §3 could possibly apply. If, as we think, §3 adds something to the meaning of the Act, the facts of the present case are not within §2.

"For several reasons, the conviction cannot be sustained on the theory that appellants conspired to violate §3. * * * (3) The record shows that the case was tried and the jury were instructed with reference to §2 only."

In *United States v. Barton,* 134 F.(2d) 484 (2nd Cir.), the court discusses the difference between the two separate crimes and what is required in the way of proof under each section. In *Kavalin v. White,* 44 F. (2d) 49 (10th Cir), it was held that the two sections stated separate crimes, that is, to procure a ticket under §2421 was separate and distinct from inducing the woman to go under §2422.

There is no reason why, if the government was in doubt as to which statute was violated, it could not have indicted the defendants for conspiracy to violate both

Sections 2421 and 2422. *Tobias v. United States,* 2 F. (2d) 361 (9th Cir).

Specific terms in a statute prevail over general terms.

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * * The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsberg & Sons v. Popkin,* 285 U.S. 254, 76 L.ed. 704.

The rule has been applied to Mann Act cases and to the exact question under consideration. *La Page v. United States,* 146 F.(2d) 536 (8th Cir.); *Hill v. United States,* 150 F.(2d) 760 (8th Cir.). In these cases the defendant was charged with causing a woman to be transported in interstate commerce for the purpose of prostitution. The proof showed merely a telephone message to the woman long-distance, and that as a result of the conversation the woman went. It was held in each case that the proof did not support the charge.

But counsel for the government argue, apparently, that although the indictment is plainly laid under §2422, the conviction must be sustained if the proof shows guilt under some other statute. It is true that it is the practice in some district courts not to allege in the body of the indictment a violation of any statute, at least by number, but to note the number on the margin. It has been held in some cases, where the defendant could not possibly be misled, that an incorrect reference is not

fatal, and these cases are cited in appellee's brief. But these cases do not apply here. In the case at bar §2422 was twice referred to by number in the body of the indictment, and allegations were contained which could only be a part of the offense included in that section.

Appellant is not protected from prosecution under §2421 by the judgment here. It was held in this circuit in *Louie v. United States,* 218 Fed. 36, that a conviction on a charge of conspiracy was not a bar to a prosecution for aiding and abetting the same offense.

In using the word "cause" in the indictment in the case at bar the government meant inducing or persuading. The defendants were not charged with actually transporting, nor of procuring tickets. In *La Page v. United States,* 146 F.(2d) 536, 156 A.L.R. 965, *supra,* the defendant was charged with violation of §398, now §2421, with causing a woman to go in interstate commerce for the purpose of prostitution. The proof showed only inducement under the next section. It was held the conviction could not be allowed to stand. It was argued that causing a woman to go under §2421 was the same as inducing her to go under §2422. But the court held that the two sections stated different crimes, that §3 of the act (§2422) was of similar and narrower application that §2 (§2421).

In *United States v. Hutcheson,* 312 U.S. 219, 85 L.ed. 788, the indictment was laid under the Sherman Act. In ruling upon a demurrer to the indictment the court held that the later Clayton Act and the Norris-LaGuardia Act might be considered. These acts could be shown as taking the sting of criminal conduct out of the earlier

law. The case is not authority for the proposition that the grand jury may indict under one law, and the government prove guilt under another.

In *Williams v. United States,* 168 U.S. 382, 42 L.ed. 509, the *facts* were stated in the indictment. These facts did not establish a violation of the revenue laws, but did show a violation of a statute punishing extortion. The statute relating to the revenue laws was cited in the margin of the indictment, and the trial judge presumed that the indictment would lie under those statutes. The Supreme Court ruled that while the conviction could not be sustained under the revenue laws, it could be under the extortion statute.

In the case at bar appellant was led to believe that he would be called upon to defend under §2422, not only because of the two references to that section, but because of the facts stated which it would have been unnecessary to allege if the indictment had been intended under the other section. And the indictment does not make sense the way it is framed without the reference to the particular statute.

Counsel for the government are wrong when they argue (p. 7) that the indictment states an offense under §2421 where it is alleged that the defendants conspired to cause the woman to go. At the risk of repetition, we must point out that causing a woman to go is not a crime; the crime lies in transporting, or procuring tickets under §2421, or inducing under §2422.

The defendant was misled to his prejudice if the indictment is construed under §2421. No crime was shown, nor indeed could a crime be committed to conspire

under §2422. And Rule 12(b) (b) of the Federal Rules of Criminal Procedure, provides that the failure of the indictment to charge an offense shall be noticed by the court at any time during the pendency of the proceeding. This court has ruled that this means that if this appears the case should be dismissed on appeal. *Hotch v. United States,* 208 F.(2d) 244.

The many criticisms of the use of the conspiracy charge to obtain a conviction where it is doubtful that a charge of the substantive crime would stand up are climaxed by the opinion of the concurring judges in *Krulewith v. United States,* 336 U.S. 440, 93 L.ed. 790. What is said there is applicable to this case.

> "The modern crime of conspiracy is so vague that it almost defies definition. * * * The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plottings and violence on a scale that menaces social stability and the security of the state itself. * * * But the conspiracy concept also is superimposed upon many concerted crimes having no political motivation. It is not intended to question that the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunity and resources of many is obviously more dangerous and more difficult to police than the efforts of a long wrongdoer. *It also may be trivialized,* as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from Florida to New York to ply their trade, * * * *and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law.* However, even when appropriately invoked,

the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." (Italics ours)

The quoted language sems particularly pertinent in view of the argument of counsel for the government that although the charge is obviously framed under §2422, it should be construed as though founded on §2421. Appellant prepared his defense against a charge of conspiracy—not to transport; not to procure tickets; not to aid and abet these things—but for a conspiracy to induce and persuade the female to go. It is manifestly unfair now to say that he should have prepared himself to defend against a wholly different charge.

Respectfully submitted,

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Attorneys for Appellant

No. 14356

In the
United States Court of Appeals
For the Ninth Circuit

VERN GEORGE DAVIDSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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In the
United States Court of Appeals
For the Ninth Circuit

VERN GEORGE DAVIDSON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14356

Appellant's Opening Brief

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant by the District Court of the Southern District of California.

This court has jurisdiction under the provisions of 28 United States Code, Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Appellant was indicted on July 8, 1953 under U.S.C. Title 50, App. Sec. 462—Selective Service Act, as amended 1951, for refusing to submit to induction [R. 3][1]

[1]All references to the Transcript of Record are designated by pages of it, as follows [R. 3]. The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1. All references to the file are designated by pages of Exhibit 1, as follows: [Ex. p. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of Exhibit 1.

Appellant was convicted by Judge Harry C. Westover, jury trial having been waived, on November 30, 1953 [R. 6-14]; he was sentenced by said judge to a 3-year term of imprisonment on December 7, 1953 [R. 15-16].

In the court below as well as before the Selective Service agencies, and the Department of Justice appellant claimed to be a conscientious objector to all participation in military activities and that he was entitled to a classification as such. His initial claim was made in his Classification Questionnaire [Ex. pp. 4-18]; this was on October 20, 1948. The Classification Questionnaire is the first opportunity a registrant has to make such an avowal.

To his Questionnaire he added explanations of his answers.

> "It will be noted that I have not completed the Second statement in this series. I would like to make it clear that I feel that no humanitarian or democrat should ask or should answer such a question. Such a question has its basis in the prejudice and discrimination that now dominated the armed forces of this country. Therefore I consider my race as my own business and shall refuse to answer this question under any circumstances." [Ex. p. 10.]

Series XIV of the Questionnaire is to be signed by all registrants who profess to be conscientious objectors. It is in essence a request to be sent the selective service document entitled Special Form for Conscientious Objector. Appellant signed Series XIV [Ex. p. 15] and wrote, after his signature, "See note attached."

On pages 11, 12 and 13 of the Exhibit we find this note; it contains a copy of a letter he had sent to his college paper, preceded by the following:

> "It will be noted that I have signed series XIV. I would like to make my position clear. I do conscientiously object to war and to conscription for any reason. But, my beliefs are not religious, they are basicly [*sic*] political. As a political objector I shall resist this totalitarian move by my own country as I would resist it in any other country. My position is briefly stated in the attached newspaper article by myself. If after considering these facts the board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the board with the understanding that my objections are not religious but political."

He was then 19 years and 2 months old.

The Minutes of Actions [Ex. p. 10] reveal the following facts: The local board sent him the form; he executed and filed it on February 27, 1950; he was classified in Class I-A on July 12, 1950; his appeal was honored and the appeal board, after a preliminary finding [required by the then existing regulation] asked the United States Attorney to procure an advisory recommendation from the Department of Justice. The request is on page 32 of the Exhibit. This is the standard procedure where the registrant's request for a conscientious objector classification is not granted by the local board or by the appeal board on its first, (preliminary) consideration. The then governing regulation, § 1626.25 plus the Attorney General's practice, provided for: (1) an extensive FBI investi-

gation (secret), (2) a Hearing Officer's report to the Attorney General (a copy according to the then existing practice, being placed in the registrant's selective service file; see pages 36-41), and (3) an Attorney General's recommendation to the Appeal Board (copy being placed in the file; see page 35).

The Hearing Officer informed the Attorney General that he believed appellant seems to be sincere [Ex. p. 40] but concluded that appellant was not religious in his beliefs or that his beliefs were based on his early religious training. He noted that appellant's ideas were "of rather recent origin. During his first two years in the university he took military training. All reports are that he is of "good personal character." [Ex. p. 39].

Appellant was then 21 years of age.

The Hearing Officer, the Attorney General and the Appeal Board agreed that he should not receive a conscientious objector classification, the Appeal Board Classification of I-A being on February 13, 1951.

Appellant was ordered to report for induction but, by reason of his scholastic work, the order was postponed. [Ex. pp. 43—].

Thereafter, once again (on November 6, 1951, see page 58), after his appeal was honored, the Appeal Board requested the United States Attorney to secure an advisory opinion from the Attorney General. During the subsequent investigating period appellant submitted evidence to support a claim advanced for an occupational deferment; appellant had left school and taken employment as the National Secretary and Or-

ganizer for the Young Peoples' Socialist League [see page 59, 61, 62].

Appellant testified in court that the following occurred during this investigatory period and before the Attorney General sent his letter of recommendation to the Appeal Board on July 29, 1952: [R. 51-52, 75-87; stipulation: 83-86].

> He was instructed by Nathan Freedman, Hearing Officer of the Department of Justice to appear before him in Los Angeles on May 19, 1952 for the hearing officer hearing but, because appellant was employed in New York at the time appellant asked to have the hearing transferred to a New York Hearing Officer; the hearing was transferred and a New York Hearing Officer named Gallagher notified him to come to his office for the hearing. Appellant appeared before the Hearing Officer. He was informed by Mr. Gallagher that the hearing had been cancelled. This was almost two years after the "Los Angeles" hearing before Mr. Ray Files. Appellant testified that his occupation had meanwhile changed and that his views with respect to religious objection to war had matured. [R. 52]. No hearing was ever held to hear about this.
>
> Appellant was then one month short of being 23 years of age.

After the cancellation of the July 23, 1952 hearing by the New York hearing officer, the Attorney General sent the file to the Appeal Board with his recommendation that the appellant not be classified as a conscientious objector [Ex. pp. 64-65].

Thereafter appellant was ordered to report for induction on October 17, 1952. [Ex. p. 69].

Upon his verbal refusal to submit [Ex. p. 72] and his written statement to the same effect [Ex. p. 73] appellant was indicted, as aforesaid.

QUESTIONS PRESENTED AND HOW RAISED

I

The record shows that upon the second appeal of the case to the appeal board there was no hearing conducted by the Department of Justice (although defendant appeared at the place and at the time set forth in the order to appear) as required by the Act and Regulations in cases of appeals by registrants professing conscientious objections to all military training and service both combatant and non-combatant.

The question presented is whether, on a second administrative appeal (over 18 months having elapsed) a second hearing officer hearing is required to determine the current *bona fides* of the registrant's professions of conscientious objection to war.

This point and the following ones were raised by oral motions for judgment of acquittal. [R. 21, 29 and 71.]

II

The record shows that before trial appellant caused to be subpoenaed the secret FBI investigative report. The Government moved to quash the subpoena. This motion was granted. [R. 23-24.] The motion of the appellant to examine the FBI report was denied. [R. 23-24.]

In the motion for judgment of acquittal complaint was made that the failure to compel the production of the FBI report had deprived appellant of due process of law.

The question presented here, therefore, is whether the trial court committed reversible error in failing and refusing to permit the secret FBI investigative report to be examined and used by the appellant upon the trial for the purpose of showing that the Los Angeles hearing officer and the Attorney General (after the first and/or second appeal) had failed to give a full, fair and adequate summary of the adverse information appearing in the report as required by due process of law, the Act and Regulations.

III

The record shows that the undisputed evidence was that the recommendations by the Department of Justice to the appeal board were both made without copies or notice to appellant. The appellant also testified that he did not know about the unfavorable recommendation until after the appeal board determination. [R. 51.]

In the motion for judgment of acquittal it was contended that the action taken by the appeal board in accepting the recommendation of the Department of Justice and denying the conscientious objector status without giving appellant the right to answer the unfavorable recommendation was a deprivation of procedural due process of law. [R. 30, 71-72.]

The question here presented, therefore, is whether the use of the unfavorable recommendation by the

Department of Justice to the appeal board and the denial of the conscientious objector status without giving appellant an opportunity to answer the unfavorable recommendation were a deprivation of appellant's rights to a full and fair hearing contrary to due process of law guaranteed by the fair and just provisions of the Act and the Fifth Amendment to the United States Constitution.

IV

The undisputed evidence is that the local board failed to have available an Advisor to Registrants and to have posted conspicuously or any place, the names and addresses of such advisor, as required by the Regulations, Section 1604.41.

The question presented is whether this violation of law alone, or in connection with other circumstances in evidence constituted a denial of due process.

V

The record shows that despite the fact all the selective service agencies *at all times* (and the Department of Justice itself, on the occasion of the first appeal), believed appellant was entitled to exhaust his full administrative remedies, the Department, at the last minute, prevented appellant from having the "Brooklyn" hearing officer hearing. The undisputed reason given was "Because you already had a hearing". [R. 52.]

The question presented is whether the lapse of time, almost two years, after the first (Los Angeles) hear-

ing, plus the fact all other administrative appellate steps were given Davidson required a "Brooklyn" hearing; put another way: did the Department of Justice misconstrue the law?

VI

The record shows that appellant from the first asserted: "I do conscientiously object to war and to conscription for any reason", [Ex.p.11] but repeatedly stated he wasn't religious but was a political objector and that he didn't believe in a "Supreme Being". [Ex. p. 20.]

The law requires that a registrant establish that he believes in a Supreme Being and that the basis of his objections are religious.

The question presented is whether the law discriminates againt religions that do not believe in a Supreme Being and against registrants whose religion is not one that is expressed in orthodox terms.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting appellant and in entering a judgment of guilty against him.

III.

The district court erred in refusing to permit the appellant to explain the answers he gave to the court's questions. [R. 70-71.]

SUMMARY OF ARGUMENT

I.

The undisputed evidence shows that appellant was not given a hearing officer hearing, in Brooklyn, on July 23, 1952; the only reason disclosed is the explanation given appellant, when he asked the hearing officer "Why?" "Because you already had a hearing." [R. 52.]

The law and the regulations make the hearing mandatory.

> *United States v. Nugent,* 73 S. Ct. 991;
> Sec. 6(j) U.S.C. 50 App.

Appellant received all other of the administrative appellate steps on his second appeal except the hearing. Heretofore, the Department of Justice always agreed with General Hershey that *each* time he appealed a registrant was entitled to the so-called "special" appellate procedure for conscientious objectors.

> "The Department of Justice and Selective Service took the position that *each* time the case of a registrant who claimed to be a conscientious objector came before the board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct

application of the law. In addition *such reference was necessary because new factors* in the case might be brought to light by the Department's investigation and hearing." (Emphasis added.)

See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. 1, page 150, Washington, Government Printing Office, 1950. Also see pages 147 and 155.

The Attorney General misconstrued the law when he denied appellant the second hearing. The fact that appellant already had had a hearing did not excuse the denial of the *re-examining* hearing since (1) so much time had elapsed after the first hearing, and (2) the intent of the law is that *all* the facts are to be re-examined by a Hearing Officer.

II.

Appellant was denied his rights to prodecural due process of law when the appeal board considered and acted upon the adverse recommendations made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendations.

The recommendations by the Department of Justice were adverse to appellant. The appeal board was told by the Department of Justice that appellant was not a conscientious objector. The recommendation was considered by and relied upon by the appeal board without giving appellant an opportunity to answer it before the appeal board made the final classification.

The denial of the right to answer an unfavorable recommendation is a deprivation of procedural due process of law.—*Kwock Jan Fat v. White,* 253 U. S. 454, 459, 463, 464; *Morgan v. United States,* 304 U. S. 1, 22, 23; *Degraw v. Toon,* 2d Cir., 151 F. 2d 778.

The trial court should have sustained the motion for judgment of acquittal.

III.

The court below committed reversible error when it refused to receive into evidence the FBI reports and excluded them from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was granted.

The trial court committed grievous error when it refused to permit the exhibit to be used as evidence. The court denied appellant's request to use it. The trial court excluded it.

No claim of privilege is applicable here. The Government waived its rights under the order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States v. Andolschek,* 2d Cir., 142 F. 2d 503; *United States v. Krulewitch,* 2d Cir., 145 F. 2d 87; *United States v. Beckman,* 155 F. 580; *United States v. Cotton*

Valley Operators Committee, W. D. La., 1949, 9 F. R. D. 719.

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line v. United States,* 2d Cir., 163 F. 2d 133.

The secret investigative reports were material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative reports without receiving the secret report into evidence and comparing it with the summary made by the hearing officer. —*United States v. Nugent,* 346 U. S. 1; *United States v. Evans,* D. Conn. Aug. 20, 1953, 115 F. Supp. 340.

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

IV.

The law gives selective service registrants the right to have free advice from government agents termed Advisors to Registrants. Appellant's board violated the law and failed to post their names and address, as required, and, in fact, failed to have any Advisors to Registrants.

32 C. F. R. §1604.41.

Appellant claimed he disbelieved in a Supreme Being and didn't have religious beliefs. Two learned ministers believed that his bald expression of his beliefs did not correctly present his true religious views, and they were prepared to so testify at the trial, thus demonstrating that appellant had been prejudiced by the failure to have an Advisor.

Appellant was injured during his selective service processing for he obviously needed the assistance of an Advisor in explaining and "translating" his aversion to orthodox religious terms. With an Advisor he could have removed the clouding of his claim.

V.

Congress has required that a registrant, professing to be a conscientious objector to war show certain qualifications to be entitled to a conscientious objector classification: he must believe in a Supreme Being and his beliefs must be "religious" and not be a "merely personal moral code".

Appellant argues that the intent of Congress, on these two subjects, has been misconstrued by the Attorney General, with respect to this appellant.

Appellant's beliefs and conduct are within the boundaries of what are "religious" beliefs.

The expression "merely personal moral code" is a misnomer and has no practical application.

VI.

Proceeding on the basis that this court might determine that the intent of Congress has not been mis-

construed by the Attorney General, it is appellant's final position that the "Supreme Being" clause offends the Constitution.

A. The VIth Article (3rd clause) provides that no religious test shall ever be used as a qualification for any political office. The Supreme Being clause, nevertheless, makes it impossible for many truly religious citizens to qualify for a conscientious objector classification; inevitably, their religious scruples make felons out of them, as the law now stands, and they are thereafter disqualified for public office.

B. The 1st Amendment provides that Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof.

The Supreme Being clause is an establishment of the religious views of the majority:

(1) Congress has no right to legislate what is and what is not religious belief.

(2) Finally, a registrant may have religious beliefs, meeting all reasonable standards, even though he does not believe in a Supreme Being.

ARGUMENT

I

Upon the Second Appeal of the Case to the Appeal Board There Was No Hearing Conducted by the Department of Justice as Required by the Act and Regulations in Cases of Appeals by Registrants Professing Conscientious Objections to All Military Training and Services Both Combatant and Non-Combatant.

A. The Facts:

There is no dispute over the following facts concerning the second appeal:

1. On November 6, 1951 the Appeal Board sent the standard request to the United States Attorney that sets in motion the special appellate procedures for conscientious objectors, hereafter set forth and discussed; [Ex. p. 58]
2. On May 7, 1952, pursuant to aforesaid request, the hearing officer in Los Angeles directed appellant to appear before him; [R. 51-52. There is no page in the exhibit on this because the hearing officer procedure is not a part of the selective service system but is a service performed for it by the Department of Justice]
3. On May 19, 1952 appellant telephoned the Los Angeles Hearing Officer to have the matter transferred to a New York Hearing Officer; [Ex. 62]
4. On May 26, 1952 the United States Attorney at Los Angeles sent the file to the United States

Attorney in Brooklyn with the following request:

> "Will you kindly send this case to a hearing officer in your district as soon as convenient?" [R. 84]

5. On July 9, 1952 Hearing Officer Thomas O'R. Gallagher, directed appellant to appear before him on July 23, 1952, at 188 Montague St., Brooklyn, N. Y. [Notice not available during trial. The fact is conceded by appellee.] [R. 85]
6. On July 15, 1952 the Attorney General withdrew the case from the hearing officer, Hon. Thomas O'Rourke Gallagher. [R. 85]
7. On July 23, 1952 appellant appeared before Mr. Gallagher. The undisputed testimony concerning what transpired is as follows:

> "When I got up to see Mr. Gallagher, he came out and he asked me my name, and he said, 'You are not even supposed to be here.' And I said 'Why?' He said, 'Because you already had a hearing.' And so I went home." [R. 52.]

During the trial the Government argued that appellant's file disclosed he wasn't eligible for a hearing officer hearing because he wasn't a *religious* objector. This argument so impressed the court that it was used as the basis for decision. [R. 87-95.] This argument is speculative for it was contrary to the evidence that only one reason was given for the cancellation of the hearing. True, the Attorney General gave appellant's views as a reason the Appeal Board should deny the claimed classification but appellant's views were never

advanced as a reason for denying him the hearing. Therefore, at this juncture, we will deal only with the evidence, namely, does the fact a registrant "already had" a hearing preclude him from having another thereafter? [However, a discussion of the *eligibility* of appellant for a conscientious objector classification is to be found hereinafter in Points V and VI.]

B. The Law:

The Act and the Regulations show that it was the intent of Congress that the *bona fides* of professed conscientious objections be determined and that when the question reaches the administrative appellate level that the Department of Justice shall help the Selective Service System, in the following manner:

> "The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing." [§6(j) of U. S. C. 50 App.] For the verbatim regulations based on the Act, and in effect at the time, see Point IV hereinafter.

C. Argument:

It is clearly intended that the registrant be permitted to attend the hearing. *United States v. Nugent,* 73 S. Ct. 991.

(1) Concerning the appropriate inquiry:

Although the record is blank concerning the "approprate inquiry" [this is the FBI investigative

report] it is obvious that the period from November 6, 1951 to May 7, 1952 was so used: the court has observed dozens of such 6 months periods so used in conscientious objection cases and with the knowledge we have of the expeditious manner all other items of procedure were handled in this case [see Facts above] this court should take judicial notice that the usual FBI investigations were made.

(2) Concerning the hearing:

The only reason disclosed by the selective service file, or the evidence, concerning why appellant was not given the hearing in Brooklyn was "Because you already had a hearing". [R. 52.] The question arises: Since all the officials of both the Selective Service System and of the Department of Justice worked from September 1951 to July 1952 to process the second appellate determination why was the final step of the "special procedure for conscientious objectors" not considered necessary? Almost two years had elapsed since appellant's Los Angeles hearing officer hearing. Nearly everyone would concede that a young man's views on conscientious objection undergo some kind of change and/or maturation in such a period. Conceivably, appellant could have come to realize that his views *were* essentially religious and that the only thing that stood between him and a conscientious objector classification was semantics. Conceivably, he could even have undergone an orthodox conversion to orthodox religion. The FBI investigation would have revealed the facts to the Brooklyn hearing officer. If it didn't reveal them then appellant could have testified

on this subject to the said hearing officer; also if it did so reveal and if the Department of Justice had carelessly or maliciously suppressed the facts known to them then when appellant subpoenaed in the second set of investigative reports the court could have compared them with the official recommendations to the appeal board even if the court decided not to permit appellant to use them during the trial. See *United States v. Evans,* 115 F. Supp. 340.

It is clear from the Act, the Regulations and from *Nugent, supra,* that the hearing is mandatory and that the claimed classification is not to be denied the registrant on the basis of *part* of the evidence which has not been reexamined *at the hearing.* Since so much time had elapsed it should have been obvious to everyone that the Brooklyn hearing was essential. It was obvious to the Los Angeles hearing officer, on May 7, 1952, when he arranged for the May 19th hearing; obvious to him on May 19th when he asked the United States Attorney at Los Angeles to have it transferred to Brooklyn; obvious to the United States Attorney at Los Angeles when he did so arrange; obvious to the United States Attorney at Brooklyn when he arranged for one with the Brooklyn hearing officer, and obvious to the hearing officer when he set July 23, 1952 as the date for the hearing. The Attorney General alone didn't agree.

To the above list of persons who believed Davidson *was one* entitled to the administrative appellate determination (as are all professing conscientious objections) must be added *all the selective service officials.* Even the State Director thought so [Ex. p. 31.] This

is of major importance because Congress has intended that their judgment on factual matters is of prime consideration. They are the ones who are to pass on all factual matters. See *Estep v. United States,* 327 U. S. 114. At all stages the selective service agencies *approved* appellant's desire to exhaust his administrative procedure. The very first time the question arose it was squarely presented and squarely decided: the first document appellant gave the local board was SSS form 100, Classification Questionnaire. He signed the Series XIV conscientious objector declaration-request for SSS form 150, Special Form for Conscientious Objector and he attached a note (Exhibit p. 11) which stated, among other things: "If after considering these facts the board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it and return to the board with the understanding that my objections are not religious but political." The local board obviously believed registrants are entitled to have their claims determined and sent him the form and neither then or thereafter did the local board (or the appeal board, or State Headquarters at any time) make any effort to deprive Davidson of his full appellate rights.

The attitude of General Lewis B. Hershey, the Director of Selective Service (and the one-time attitude of the Department of Justice itself) on this subject is evident from a report prepared by reason of the 1947 suggestion of President Truman:

> "The Department of Justice and Selective Service took the position that *each* time the case of a registrant who claimed to be a conscientious ob-

jector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition such reference was necessary because *new factors* in the case might be brought to light by the Department's investigation *and hearing.*" (Emphasis added.)

See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. 1, p. 150, Washington Government Printing Office, 1950. Also see pages 147 and 155.

It is believed that there is no case squarely in point, that is, involving repetitive hearing officer hearings. There are three unreported cases where trial courts acquitted because a hearing officer hearing was never given, and one reported case: *United States v. Frank,* 114 F. Supp. 949 (Judge Lemmon, N. D. Calif. June 16, 1953). There are many cases that hold that the denial of a hearing [local board hearings, in all these cases] provided by the regulations is a denial of due process.—*United States v. Peterson,* 53 F. Supp. 760 (N. D. Calif. S. D.); *United States v. Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *United States v. Fry,* 203 F. 2d 638 (2nd Cir.); *Davis v. United States,* 199 F. 2d 689 (6th Cir.).

A closely related point [denial of hearing officer hearing] is presently before this court in the case of *Sterrett,* No. 13901 and *Triff,* No. 13952 argued February 16, 1954 and as yet undecided. The legislative history is set forth in the briefs in the *Sterrett* and *Triff* appeals.

It is submitted that it was illegal for the final decision to be made wihtout the Brooklyn hearing officer hearing.

II

Appellant was denied his rights to procedural due process of law when the appeal board considered and acted upon the adverse recommendation made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendation.

The recommendations of the Department of Justice were against appellant. The appeal board was told that the conscientious objector claim should be denied. Appellant was not given an opportunity to answer the recommendations before the appeal board made the final classifications. Their classifications thereby denied the conscientious objector claim. The appeal board accepted and followed the recommendations by the Department of Justice.

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25) provided:

> "*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.* — (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> "(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any

form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class

I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Action by Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraph (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by

his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendations of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed

> as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

The holding by the court below that there was no deprivation of due process of law is out of harmony with many decisions. The courts have uniformly held that where an administrative determination is made upon an adverse recommendation by a government agent it is necessary that the person concerned be advised of the governmental proposal and be heard upon it before the final determination. In *Brewer v. United States,* 4th Cir., April 5, 1954, 211 F. 2d 864, the court held that consideration by the appeal board of the secret FBI investigative report, inadvertently sent to the board by the Department of Justice, deprived him of due process of law. The court found that the registrant was denied the right to answer the FBI report before the appeal board. The court, however, said erroneously that a registrant was given the right by the regulations to see and answer the recommendation of the Department of Justice to the appeal board. Contrary to that statement are the regulations which do not grant the right. The holding by the court below on this point is also in direct conflict with *Degraw v. Toon,* 2d Cir., 151 F. 2d 778, and *United States v. Balogh,* 2d Cir., 1946, 157 F. 2d 939, vacated 329 U. S. 692, and later affirmed 2d Cir., 1947, 160 F. 2d 999.

The holding by the court below that action on secret reports of a trial examiner or agency hearing officer without an opportunity to reply before final decision is made by the administrative agency is not a violation of

due process of law conflicts directly with *Kwock Jan Fat v. White,* 253 U. S. 454, 459, 463, 464; *Morgan v. United States,* 304 U. S. 1, 22, 23; *Interstate Commerce Comm'n v. Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91-92, 93; *United States v. Abilene & S. Ry. Co.,* 265 U. S. 274, 290; and *Oregon R. R. & Navigation Co. v. Fairchild,* 224 U. S. 510, 524.

In the case of *Morgan v. United States,* 304 U. S. 1, the Court said: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants." (304 U. S. at page 19) Identically the same secret proposal was made here by the Department of Justice, and the appeal board acted upon it in this case without the knowledge of the appellant in time to protect himself. The star-chamber procedure prescribed by the regulations is a denial of due process of law. It conflicts with the "fair and just" provisions of Section (1c) of the act, and the Fifth Amendment to the United States Constitution.

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of

an effective national economy."—June 24, 1948, ch. 625, I § 162 Stat. 604 amended June 19, 1951, ch. 144 title I § 1(a) 65 Stat. 75.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

III

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative reports of the FBI. A motion to quash was made by the Government. The trial court refused to permit them to be used as evidence.

The secret reports of the FBI made in the investigation of the conscientious objector claim of appellant were subpoenaed. The trial court excluded the documents and forbade them to be received into evidence. It refused to allow them to go into evidence because it held the order of the Attorney General, No. 3229, made them confidential and forbade that they be received into evidence.

Under the decision of the Supreme Court of the United States in *United States v. Nugent,* 346 U. S. 1, it was held that the statute required the Department of Justice to make a fair, complete resume or summary of all the FBI investigative report and give it to appellant. A resume or summary was given to appellant on the first hearing. A resume or summary

was made by the Los Angeles hearing officer to the Department of Justice.

The only way that the Court can determine whether the summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the reports produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the Court. Unless and until this Court sees and examines the FBI report and also unless and until appellant sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The Court cannot discharge its judicial function and determine whether the summary required by the Supreme Court of the United States in *United States v. Nugent,* 346 U. S. 1, is fair and adequate unless and until the Court has actually seen and examined the secret FBI report. In fact appellant's rights are not preserved unless and until he has had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Supreme Court in *United States v. Nugent,* 346 U. S. 1, dealt only with the contention that the secret FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of *United States v. Nugent,* 346 U. S. 1, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even through the records sought by the appellant are claimed to be confidential by the Attorney General's Order No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.—See *United States v. Stasevic,* S. D. N. Y., Dec. 16, 1953, 117 F. Supp. 371; *United States v. Edmiston,* D. Nebr., Omaha D., No. Criminal 82-52, Jan. 28, 1954; *United States v. Stull,* E. D. Va., Richmond D., Criminal No. 5634, Nov. 6, 1953; *contra United States v. Simmons,* 7th Cir., June 15, 1953,—F. 2d —.

The only time the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. § 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

On the trial of this case the question arose as to whether the verbal communication by the hearing officer to the appellant upon the occasion of his Los Angeles hearing constituted "a fair resume" of the evidence that was adverse appearing in the FBI reports.

The Court cannot determine whether the resume given at the hearing is fair without inspecting the secret investigative report. That report cannot be inspected unless it is subpoenaed and produced at the trial.

It is submitted that the FBI report was not privileged and that the constitutional rights of the registrant were violated when it was not produced and not allowed to be used in evidence at the trial by the appellant.

IV

The failure to have the names and addresses of advisors to registrants posted in the local board office, resulted in a denial of due process to Appellant.

Section 1604.41 of the selective service regulations, at all times has been:

> ADVISORS TO REGISTRANTS
>
> 1604.41 APPOINTMENT and DUTIES. —
>
> Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law.

> Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

Lt. Col. Francis A. Hartwell testified that he is the assistant deputy Director of Selective Service for the State of California and that there are no Advisors to Registrants "set-up" in California. [42]. In the case of *Mason v. United States,* No. 14286, currently before this court the record discloses that Lt. Col. George R. Farrell testified that he is Co-Ordinator of District Three, Selective Service System, State of California [51] and none of the boards in his district have ever complied with Section 1604.41 of the regulations [53].

It is therefore clear that no California local boards have such advisors and no names and addresses are posted. This fact, alone, but especially when coupled with the facts of this case showing that this appellant needed an advisor, amounts to a denial of due process.

Such was the holding of Judge Pierson Hall in *United States v. Kariakin,* No. 23223, S. D. California, January 12, 1954:

> "MR. TIETZ: Your Honor has heard me on all the material points that I wish to present.
>
> THE COURT: Very well.
>
> I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.
>
> MR. TIETZ: Yes, sir.
>
> THE COURT: I do not know that it could be so classified as a defective notice because I do not

know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words, I do not think the practice can result in the creation of a right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never advised that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognizes that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you."

The undisputed testimony was that appellant never received any advice from any Selective Service officials and never knew he could obtain various items of information and/or help from them. [R. 63, 58, 51.]

Since the local board violated § 1604.41 and to appellant's prejudice he was denied due process of law and should have been acquitted.

V

The "Supreme Being" and "Merely Personal Moral Code" clauses in the Selective Service Act of 1948, as amended, as applied to Appellant, were misconstrued by the Department of Justice and the Trial Court and Appellant should have been allowed to show, and The Court should have considered, that the correct construction of Appellant's Selective Service file brought him within the intent of Congress concerning a registrant's religious belief and a registrant's belief in a Supreme Being.

There is no dispute that appellant claimed (1) to be a conscientious objector and (2) entitled to a classification as such.

Also, there is no dispute that appellant's draft board didn't have posted the names and addresses of the Advisors to Registrants required by § 1604.41 of the Regulation. This point has already been argued but is important here to show that appellant was deprived of assistance in filing his selective service forms, and thereafter; put another way, he didn't have the help the regulation intended registrants were to have, help that in this instance could have "translated" his rebellious expressions to ones more orthodox, more truly expressive of the facts and more understandable.

During the trial appellant sought to use certain "translators," (two experienced ministers), who were prepared to testify that the expressions appellant used

in his file, concerning his beliefs, were actually ambiguous, and therefore needed interpretation as to whether they were descriptions of religious beliefs.

Appellant believes that it is very wrong to ask 19 year olds to define God and religious belief and then to take them strictly at their word. It is widely held that an individual's testimony concerning himself and particularly concerning his own mental attitude is not too trustworthy. Some extreme illustrations may be considered to highlight this point: over two dozen persons have confessed the Los Angeles Black Dahlia murder; the counselor or psychoanalyst listens to all that is said and then often forms an opinion quite contrary to the self-diagnosis uttered.

The two experienced ministers (and the selective service advisor, had there been one, and the Appeal Agent, had he been diligent, as required by law) were more competent to investigate and then explain ("translate") the true meaning of appellant's answers to the selective service questions on God and religion than the registrant himself. The ministers were in court, ready to testify that appellant, while abysmally ignorant of the meaning of religion, was truly religious.

The pertinent portion of section 6(j) of the Act will now be set forth (in caps and quotes) and the argument will be made substantially *phrase by phrase:*

> "NOTHING CONTAINED IN THIS TITLE SHALL BE CONSTRUED TO REQUIRE ANY PERSON TO BE SUBJECT TO COMBATANT TRAINING AND SERVICE IN THE ARMED FORCES OF THE UNITED STATES WHO

BY REASON OF RELIGIOUS TRAINING AND BELIEF. . . ."

There is confusion in the file over the question whether Davidson's objection was *by reason of* religious training and belief. On the surface it appears that Davidson and the Department of Justice are in agreement that his objection is not religious. However, it should be obvious that Davidson and the Department officials were in effect talking different languages without an interpreter. As he used the term "religious" in Form 150 he made it plain that he did not take his stand for unreasonable or superstitious religious reasons, but rather for the value of brotherhood as he had come to understand brotherhood with the help of Christ and Christians like Tolstoy and William James and the Christ-like non-christian Gandhi. He thought that to be religious within the Selective Service frame of reference meant to accept the formula "*a* Supreme Being", and that he refused to do.

Appellant, during the trial, attempted to explain the true meaning of his answers by the use of religious experts. He qualified them, and, when the court rejected their testimony he made the following proffers for both [R. 35—for Kinney, 39 for Hunter].

> "If this witness were permitted to testify, he would inform the court that based on his study of the file in question, he says that this defendant's beliefs are religious; that they are not views that are denominated political, although the defendant has so termed them. That the defendant has religious training, as shown by the file, based on about ten years of Sunday School, based on com-

ing from a home that has had occasional contact with organized religious other than the Sunday School period. That this witness' work as the national secretary of the Socialist Youth Organization is not only to him, but in the eyes of theologians, a religious activity; particularly, as set forth in James, [James 2:14-26] in that it is social action. The equivalent of the social action work of various large denominations is well known to you, particularly the Methodists, the Friends, and others.

"That this defendant has an aversion to the use of orthodox terms. That this aversion is due to an annoyance with the prevailing attitude that can perhaps be best expressed by an incident in Gandhi's life, when he was approached by some friends, and one said, "You are a good Christian." And he said, 'I consider that an insult. But if you were to say I am Christ-like, I would consider that the highest compliment you could pay me."

"So if this defendant, in his reaction to the prevailing attitude finds, as he sees it, where people claim to have a religion but do not practice it, has devoted his life to certain religious ideals recognized by theologians, to promote a better society and equality of man, that he does have not only a religious training, which is set forth in his file, but has a religious belief.

"This witness would give the opinion that he also—although the defendant denies it—he also believes in a Supreme Being. He goes beyond that. The witness, however, would enlighten the court on the point of Supreme Being in this way—unless I am sadly misquoting the witness, and I don't think I am; he considers that the term "a Supreme

Being" is a misnomer; could be considered blasphemous in itself; that the defendant has gone even beyond that point, and he believes in a creative force. He does not choose to call it "a Supreme Being," with the emphasis on the article "a".

Then the witness would go on to testify on another point, if permitted, and that point is, as was stated as being the last point I would like to argue: With the second innovation in the 1948 law, and readopted in the 1951 law, proscribing a merely personal moral code, that there is no such thing as a merely personal moral code, and he would elucidate on that by pointing out that we are creatures of our environment, and our environment is one that frowns on killing, and is a contradiction in terms, and Congress was in error.

That, your Honor, is the substance as I, as a layman, would state the testimony of this witness, and of the subsequent witness, whom I would like to at least qualify, so that we can have the record for that witness, too."

So much that passes for religion is superstitious and unreasonable and opposed to social progress, so many who call themselves Christians, make Negroes and others unwelcome in their churches and confuse their Christianity with other things such as military nationalism, that Vern Davidson refused military service, he said, *by reason* of the fact that he was a Socialist. That is true, but it is also true, and more basically true, that he is a Socialist by reason of the fact that he has belief in the way of life that Christ was describing—a way of life that stresses brotherhood. Davidson found

that the Socialist groups of his acquaintance practiced brotherhood more consistently than the average group labeled as "religious" did, and by reason of his religious training and belief, he chose to stress the practice and to deny the label. So, an official of the Department of Justice system has illegally construed the law as excluding Davidson from part of his appellate procedure.

> "IS CONSCIENTIOUSLY OPPOSED TO WAR IN ANY FORM.

This is granted. See hearing officer's report [Ex. p. 38—].

> "RELIGIOUS TRAINING AND BELIEF IN THIS CONNECTION MEANS AN INDIVIDUAL'S BELIEF IN A RELATION TO A SUPREME BEING."

The law here does not say that the individual must accept the formula, "a Supreme Being." Vern Davidson rejects that formula. And as the law has been misconstrued, that refusal excluded him from the hearing he sought.

Since his draft board was illegally functioning without an Advisor (§ 1604.41) and the Government Appeal Agent did not diligently investigate the case as required by the regulations (§ 1604.71), the fact that Davidson affirms belief in a creative power greater than man was not brought out in the selective service file, and the Attorney General apparently assumed that Congress had the power to require literal acceptance of a formula, "a Supreme Being." The problem concerning acceptance of such a formula is

treated in *Systematic Theology,* Vol. I, by the Reverend Doctor Paul Tillich, professor of philosophical theology at Union Theological Seminary in New York. The book was published in 1951 by the University of Chicago Press.

"It is a remarkable fact that for many centuries leading theologians and philosophers were almost equally divided between those who attacked and those who defended the arguments for the existence of God. Neither group prevailed over the other in a final way. This situation admits only one explanation: the one group did not attack what the other group defended. They were not divided by a conflict over the same matter. They fought over different matters which they expressed in the same terms. Those who attacked the arguments for the existence of God criticized their argumentative form; those who defended them accepted their implicit meaning.

" . . . However it is defined, the 'existence of God' contradicts the idea of a creative ground of essence and existence . . . Actually they" (the scholastics) "did not mean 'existence' [when they spoke of "the existence of God"]. They meant the reality, the validity, the truth of the idea of God, an idea which did not carry the connotation of some*thing* or some*one* who might or might not exist. Yet this is the way in which the idea of God is understood today in scholarly as well as in popular discussions about the 'existence of God.' It would be a great victory for Christian apologetics if the words 'God' and 'existence' were very definitely separated except in the paradox of God becoming manifest under the conditions of evistence, that

is, in the christological paradox. *God does not exist. He is being-itself beyond essence and existence. Therefore, to argue that God exists is to deny him.*" (pp. 204-205).

> "Thus the question of the existence of God can be neither asked nor answered. If asked, it is a question about that which by its very nature is above existence, and therefore the answer—whether negative or affirmative—implicitly denies the nature of God. It is as atheistic to affirm the existence of God as it is to deny it. God is being-itself, not a being." (p. 237).

At this time appellant desires to point out that it is only the Department of Justice that requires belief in the "existence" of God; Congress does not.

On page 64 of the selective service file (the Exhibit) it is to be seen that the Attorney General wrote the Appeal Board "The registrant states that he does not believe in the existence of a Supreme Being. . . ." The Act does not so express it. [§6(j)]. The registrant and the Attorney General are both in error for there must be a prior ground to all existence.

> "If taken in the broadest sense of the word, theology, the *legos* or the reasoning about *theos* (God and divine things), is as old as religion. Thinking pervades all the spiritual activities of man. Man would not be spiritual without words, thoughts, concepts. This is especially true in religion, the all-embracing function of man's spiritual life."[4]

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[4]The term "spiritual" (with a lower-case s) must be sharply distinguished from "Spiritual" (with a capital S). The latter refers to activities of the divine Spirit in man the former, to the dynamic-creative nature of man's personal and communal life." (p. 15).

"The Christian claim that the *logos* who has become concrete in Jesus as the Christ is at the same time the universal *logos* includes the claim that wherever the *logos* is at work it agrees with the Christian message. No philosophy which is obedient to the universal *logos* can contradict the concrete *logos,* the Logos "who became flesh." (p. 28)—(See John 1:14).

"God is the principle of participation as well as the principle of individualization. The divine life participates in every life as its ground and aim. God participates in everything that is: he has community with it; he shares in its destiny. Certainly such statements are highly symbolic. They can have the unfortunate logical implication that there is something alongside God in which he participates from the outside. But the divine participation creates that in which it participates." (p. 245).

"The being of God is being-itself. The being of God cannot be understood as the existence of a being alongside others or above others. If God is *a* being, he is subject to the categories of finitude, especially to space and substance. Even if he is called the 'highest being' in the sense of the 'most perfect' and the 'most powerful' being, this situation is not changed. When applied to God, superlatives become diminutives. They place him on the level of other beings while elevating him above all of them. Many theologians who have used the term 'highest being' have known better. Actually they have described the highest as the absolute, as that which is on a level qualitively different from the level of any being—even the highest being." (p. 235).

"The concrete side of final revelation appears in the picture of Jesus as the Christ. The paradoxical Christian claim is that this picture has unconditional and universal validity, that it is not subject to the attacks of positivistic or cynical relativism, that it is not absolutistic, whether in the traditional or the revolutionary sense, and that it cannot be achieved either by the critical or by the pragmatic compromise . . . it belongs to the tragic character of all life that the church, although it is based on the concrete absolute, continuously tends to distort its paradoxical meaning and to transform the paradox into absolutisms of a cognitive and moral character. This necessarily provokes relativistic reactions." (p. 151).

"INVOLVING DUTIES SUPERIOR TO THOSE ARISING FROM ANY HUMAN RELATION".

It would be legitimate to assume that Congress means that the registrant must recognize a transcendent dimension beyond merely horizontal human relationships, and to require that the registrant go beyond belief into faithful action. But any interpretation of the words, to be legal and proper, must avoid the implication that human relations *are* merely horizontal. The twenty-fifth chapter of Matthew deals with this point. "Lord, when did we see thee hungry and feed thee, or thirsty and give thee drink? . . . Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me." Mt. 25:37-40. Jesus equates love of God with love of neighbor (Mt. 22:39). The two are inseparable. John puts it point-

edly: "No man has ever seen God; if we love one another, God abides in us and his love is perfected in us. . . . If anyone says, "I love God," and hates his brother, he is a liar; for he who does not love his brother whom he has seen, cannot love God whom he has not seen." (I John 4: 12 and 20.)

There are some conscientious objectors whose religious belief is of an authoritarian and other-worldly sort. They could be easily recognized as coming under the phrase of the law which says, "involving duties superior to those arising from any human relationship." But it is illegitimate for Congress to intend or for Selective Service and/or the Department of Justice to practice an application of this to exclude those who refuse to assert or practice that which is contrary to their deepest convictions. It is improper to construe the phrase in such a way as to exclude those who emphasize human relationships. Such construction would exclude Jesus, John, James and Paul. For them God is not *a* being alongside or above other beings, but is the divine life participating in every life as its ground and aim. (See above quotations from Tillich.)

"BUT DOES NOT INCLUDE *ESSENTIALLY* POLITICAL, SOCIOLOGICAL, OR PHILOSOPHICAL *VIEWS*".

Congress may mean by that, in connection with conscientious objectors, that religious training and belief must have a vitality that goes beyond the mere intellectual activity of having views. This would be a legitimate requirement; mere intellectualism is not enough to qualify an objector. But if Congress meant

or Selective Service or the Department of Justice interprets it to mean that the intellectual must be ruled out, either Congress or Selective Service or both have exceeded their proper powers. And where Selective Service and/or the Department of Justice regards socially relevant *action* as a contraindication of religious belief, it is in error. Vital religious belief inevitably has political and sociological consequences. (See 1622.1 (d) of the Regulations forbidding discrimination on religious grounds).

"OR A MERELY PERSONAL MORAL CODE"

Congress can legitimately demand that the eligible objectors have something more than an intellectually held code. There must be action, living expression. But how can there be a moral code that is merely personal in the sense of merely individual? A moral code involves standards of *relationships,* and it evolves in a culture. Appellant's moral code is formulated in the light of Christ's teachings and is not merely intellectually held but put into action in the social scene.

> . . . . "ANY PERSON CLAIMING EXEMPTION FROM COMBAT AND TRAINING AND SERVICE BECAUSE OF SUCH CONSCIENTIOUS OBJECTIONS SHALL, IF SUCH CLAIM IS NOT SUSTAINED BY THE LOCAL BOARD, BE ENTITLED TO AN APPEAL TO THE APPROPRIATE APPEAL BOARD."

Davidson has claimed exemption *because of* such conscientious objections. His claim is clouded by his

saying, "But my beliefs are not religious, they are basicly political." The context of the whole file, however, illustrates that he means by this, 'But my beliefs are not religious [in the sense of an unreasonable and superstitious religious belief], they are basically political [in the sense of applying the teachings of Christ to the existential situation in practical loving action]. The Department of Justice, in a letter written July 29, 1952, states: "It is clear from all the evidence that the registrant bases his alleged objections, not upon religious training and belief, but upon political, sociological, or philosophical views. . . ." [Ex. p. 64-65]. That is in error. *Some* of the evidence taken out of context made it *look* clear, but the evidence needed more careful examination.

The use of theological experts for selective service problems is not an innovation. When their use is confined to ecclesiastical questions the procedure has met with judicial approval. See *United States v. Cain,* 149 F2 338, 341, and *Eagles v. Horowitz,* 67 S. Ct. 320.

The misconstruction of the laws and failure to use interpretive assistance deprived appellant of the correct construction of his expressed views. A correct construction of appellant's views, and of the law, shows he met the standards intended to be set up for recognition of conscientious objections to war.

Appellant was denied due process and should have been found not guilty by the trial court.

VI

The "Supreme Being" clause in the current draft law offends the Constitution.

The 1948 draft law (and the current 1951 amendment) contain an innovation. The so-called "Supreme Being" clause is not found in the 1940 or 1917 draft laws.

THE STATUE INVOLVED

Section 6 (j) of the Selective Service Act of 1948, as amended, (62 Stat. 604, 50 U. S. C. App. 98) also known now as the Universal Military Training and Service Act, as amended in 1951, 65 Sta. 75, 50 U.S.C.A. Appendix).

> "Nothing contained in this title [this appendix] shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code."

This definition of religious training and belief is an innovation and is not found in the 1940 draft law.

A. The Supreme Being Clause of the Draft Law offends the VIth Article (3rd Clause) of the Constitution.

> " . . . ; but no religious test shall ever be required as a qualification to any office or public trust under the United States."
>
> Art. VI § 3, U. S. Constitution.

It is a matter of common knowledge to all who have dealt with conscientious objectors that they prefer prison to surrendering their scruples, thereby becoming felons and ineligible for public office.

Estep supra.

In California and in most, if not all the states a man convicted of a felony cannot hold public office.

California Penal Code § 2600.

A test, based on religion, that a portion of the population cannot meet, is a test proscribed by the VIth amendment. Here the test in effect condemns such a person to a felon's disabilities.

The Supreme Being clause accomplishes indirectly what is prohibited to be done directly.

It's eventual effect is to effectively prevent all males who do not believe in a Supreme Being from qualifying for public office.

Communications Ass'n v. Douds, 339 U. S. 382, 415, the opinion reads:

"Clearly the Constitution permits the requirement of oaths by office holders to uphold the Constitution itself. *The obvious implication is that those unwilling to take* such an oath are to be barred from public office."

U. S. v. American Brewing Co., 296 F. 772, 776, the opinion reads:

> "Surely no one would so construe article 6 that the prohibition of a religious test applied only to officers named by the President, or the head of a department. . . ."

In *Christian Fligenspan v. Bodine, U. S. Attorney,* 264 F. 186, 195:

> "By Article VI, cl. 3, the members of the several state legislatures are to be bound by oath or affirmation to support the U. S. Constitution. This also unerringly points to a body separate and distinct from the people at large, for the latter are not required so to swear or affirm, and, in fact, none save naturalized citizens do so."

While the current "loyalty oaths" make some parts of this decision obsolete the principle remains true.

B. The Supreme Being Clause offends the 1st Amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Amendment I.

The draft law establishes the religious view of the majority as the final criterion in the consideration of a Selective Service registrant as a sincere religious person.

(1)

It is unconstitutional in violation of the freedom guarantees of the First Amendment, because Congress has no right to legislate as to what is and what is not "religion".

Appellant hastens to point out that in this argument we are not discussing the point as to whether, in the draft law, Congress was *required* to exempt conscientious objectors from the operation of the law. We are discussing the fact that Congress *did* exempt conscientious objectors, who, by reason of religious training and belief, are conscientiously opposed to war in any form and then went on, contrary to the prohibition of the First Amendment, to exclude from the meaning of "religion" a particular type of belief, namely, a religious belief based on political, sociological, philosophical, or moral tenets as distinguished from a belief in a Supreme Being. By so circumscribing what religion shall mean Congress did the very thing which the prohibition of the First Amendment sought to prevent. Had Congress merely stated that conscientious objectors, who by reason of religious training and belief were conscientiously opposed to war in any form, were to be exempt, a totally different problem would be involved. But Congress did not do this; it set forth its *own* meaning as to what religion is. This it had no power to do.

This principle of constitutional law is clearly set forth by the Supreme Court in *United States v. Ballard,* 322 U. S. 78, 86:

"The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnett,* 319 U. S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the *right to worship as he pleased* and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the trials of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for pre-

ferred treatment. It puts them all in that position." (Italics added.)

It seems clear that the authors of the Constitution precisely intended to guard against the very limitation imposed by Congress in the law.

Thus, Thompson, Secretary of the Constitutional Convention in publishing the proceedings says:

". . . the question was gravely debated whether God should be in the Constitution or not, and after a solemn debate he was deliberately voted out of it. . . ."

Clearly the Congress did the very thing that was forbidden to it. Indeed, Congress seems to recognize that political, sociological, or philosophical views or a personal moral code may be a religion but it specifically prohibited that kind of religion from protection. This it cannot do.

As was said in *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 642:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."

Congress, therefore, by attempting to set up an orthodoxy in religion has exceeded the salutary restraining bounds of the First Amendment.

(2)

One may have religious belief even though he does not believe in a Supreme Being.

The Congress legislated that before one can be said to have a religious belief, he must believe in a Supreme

Being. The history of the world and the writings of scholars in the field quickly demonstrate the fallacy of such a position.

Thus the eminent scholar, Max Muller, has said:

> ". . . if an historical study of religion had taught us . . . one lesson only, that those who do not believe in our God are not therefore to be called Atheists, it would have done some real good, and extinguished the fires of many *suto da fè.*"
>
> (Natural Religion, p. 228.)

Two of the admittedly great religions of the world claiming many millions of followers deny the existence of God as we know it. Thus in Hastings, *Encyclopaedia of Religion and Ethics* 183, Buddhism is said to be "radically adverse to the idea of a Supreme Being—of a God, in the Western sense of the word." And the same work at page 185, quotes extensively from Hindu literature to demonstrate that the Sankhya School of that religion positively denies this existence of God.

No one claims, of course, that because of their denial of God, the Sankhya or the Buddhist belief is not "religion"; nor may Congress do so.

History is replete with the stories of non-conformists who were called atheists because they did not believe according to the current mode. Outstanding, of course, are the early Christians who, pious and moral though they were, were called atheists because they did not believe as did the Greeks or Jews. Parenthetically we may note that they too were often punished by the Romans for refusing military service.

"Comte's religious conception appears to be atheistic, insofar as it rejects the view that nature and humanity are the products of a self-existent and self-conscious Eternal Cause."

(2 Hastings, Encyclopaedia, 179).

Auguste Comte, it will be recalled, is considered to be the founder of modern sociology. Yet Hastings naturally assumes Comte's view to be a "religious conception". Speaking of Comte's followers, the Positivists, Dr. Stanley Coit, founder of the English "Ethical Culture" societies thus treats of their ideal of God:

"So far as I am aware, the Positivists have never declared that Humanity is God. But they have maintained that all the homage and obedience which had been rendered to God should now be transferred to Humanity. They have worshipped Humanity, they have prayed to it, they have found strength and consolation in communion with it. Surely, then, it has become their God." *(International Journal of Ethics,* July, 1900, p. 425).

The lack of a positive assertion as to the existence of God is prominent in the religious teachings of the Unitarians and Universalists today. And prominent members of our society from whom we have derived considerable of our heritage have been among those of similar inclination.

Thus, Jefferson, in writing to his nephew at school, said:

"Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a God; because, if there be one, he must more approve the homage of

reason than of blindfolded fear. . . . Do not be frightened from this inquiry from any fear of its consequences. If it end in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise and in the love of others which it will procure for you."
(J. E. Remsbury, *Six Historic Americans,* (p. 66.)

And on another occasion he said:
"Why have Christians been distinguished above all people who have ever lived, for persecutions? Is it because it is the genius of their religion? No, its genius is the reverse. It is refusing toleration to those of a different opinion . . ." (A. J. Nock, Jefferson, p. 304).

Congress has placed the stamp of orthodoxy in a field where none exists. The Constitution embodied a toleration for *all* religion and not for some. Many scholars have defined religion in terms other than a belief in the existence of god, for example:

1. Hoffding: Religion is belief in the conservation of value.
2. Marshall: The restraint of individualistic impulses to universal human impulses.
3. Kropotkin: A passionate desire for working out a better form of society.
4. E. S. Ames: The consciousness of higher social values.
5. Elwood: Participation in ideal values of the social life.
6. E. A. Ross: The conviction of an idea bond between the members of society.

7. Mathew Arnold: Religion is morality touched with emotion.
8. G. B. Foster: The conviction that the cosmos is idea-achieving.
9. G. W. Knox: Man's highest response to what he considers highest.
10. G. A. Coe: Living the good life.
11. J. R. Seely: Any habitual and permanent admiration.
12. Bonsanquet: Loyalty and devotion toward values which are beyond the immediate self.

Indeed, many of the founding fathers would have failed to qualify as "religious" if the present act were applied in relation to them.

The Albany *Daily Advertiser* in 1831, published a sermon by Reverend Dr. Wilson in which the assertion was made that most of the founders of our country were "infidels" and that of the *first seven presidents not one of them had professed his belief in Christianity.* (Barnes, History and Social Intelligence, p. 347).

Dr. Barnes remarked:

> "The late Mr. (Theodore) Roosevelt, in one of his more facetious and gracious moments, referred to Thomas Paine, who had rendered most notable services in promoting the independence and formation of our country, as a 'dirty little atheist.' By the same criteria most of the Fathers, certainly Franklin, Washington, Adams, Jefferson, Madison, Marshall, Morris and Monroe, were likewise 'dirty little atheists' as they all shared the religious belief of Paine and most other intellectuals of the time, namely, either Unitarianism or Deism." (Ibid).

Having a lively appreciation of the evils of bigotry in religion, the authors of the Constitution took care to prevent any popular effort to secure religious conformity by law. In 1796 an attempt to insert a "Christian" Amendment in the Constitution was defeated. A speaker for the amendment referred to Washington's "Atheistic proclivities," censuring his admiration for the works of Thomas Paine. Washington, as we know, during his second administration, assured the Moslems of Tripoli, through his diplomatic representative, that "The government of the United States is not in any sense founded on the Christian religion" —a view later approved by John Adams, who sent the treaty containing this statement to the Senate, and by Jefferson, under whose administration the treaty containing the very quoted words, was ratified. *(Messages and Papers of the Presidents,* pp. 200, 245, 390.)

During the compaign for the presidency in 1800, Jefferson was widely attacked as a free-thinker. He was accused of disbelief in the conventional religion of his time, and so fearful were the orthodox of his infidel opinions that two pious ladies of New England, when they heard he was elected, buried their Bibles in the garden lest the terrible Jefferson send officers to confiscate the holy Scriptures.

It can hardly be urged that any "popular" meaning of religion was intended by the authors of the Constitution to be used in determining whether a man is religious or not. Rather, if there be a criterion at all of the quality of being "religious", it must be sought in some other quarter than prevailing customs and inherited belief.

It has been shown, that from the earliest days of the Republic, numerous individuals, many of them illustrious figures in American history, obtained their moral and religious ideas from private study and reflection, and the quality of their religion became manifest in their lives. Countless men of today similarly derive their religious inspiration from unorthodox faiths; indeed, it is often claimed as one of the glories of American achievement that in the United States such men are free to practice their own individual religion. Shall we now circumscribe this freedom with limiting definitions founded on the dogmas of prevailing orthodoxy? Shall we jettison the right of an individual citizen to define his own religion and to practice it, when it is not the character of the practice which is in dispute—the law provides for religiously inspired conscientious objection—but simply the doctrinal authenticity of his profession of religion?

It is not here maintained that the question of whether a man is religious or not can be simply determined. Fortunately, this problem is seldom presented to the Courts. But when such questions do arise, it is absolutely necessary, we submit, that the greatest of care be taken to protect that most crucial of the Four Freedoms—freedom of religion. A man's religion is his life. It is valued above life by the truly religious man. And the quality of a man's religion is best determined by reference to the quality of his actions and the consistency of his resolves.

Accordingly, the Act by defining out certain admittedly good, moral and ethical beliefs as not "religious" though, it has been shown, they have every

No. 14356

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VERN GEORGE DAVIDSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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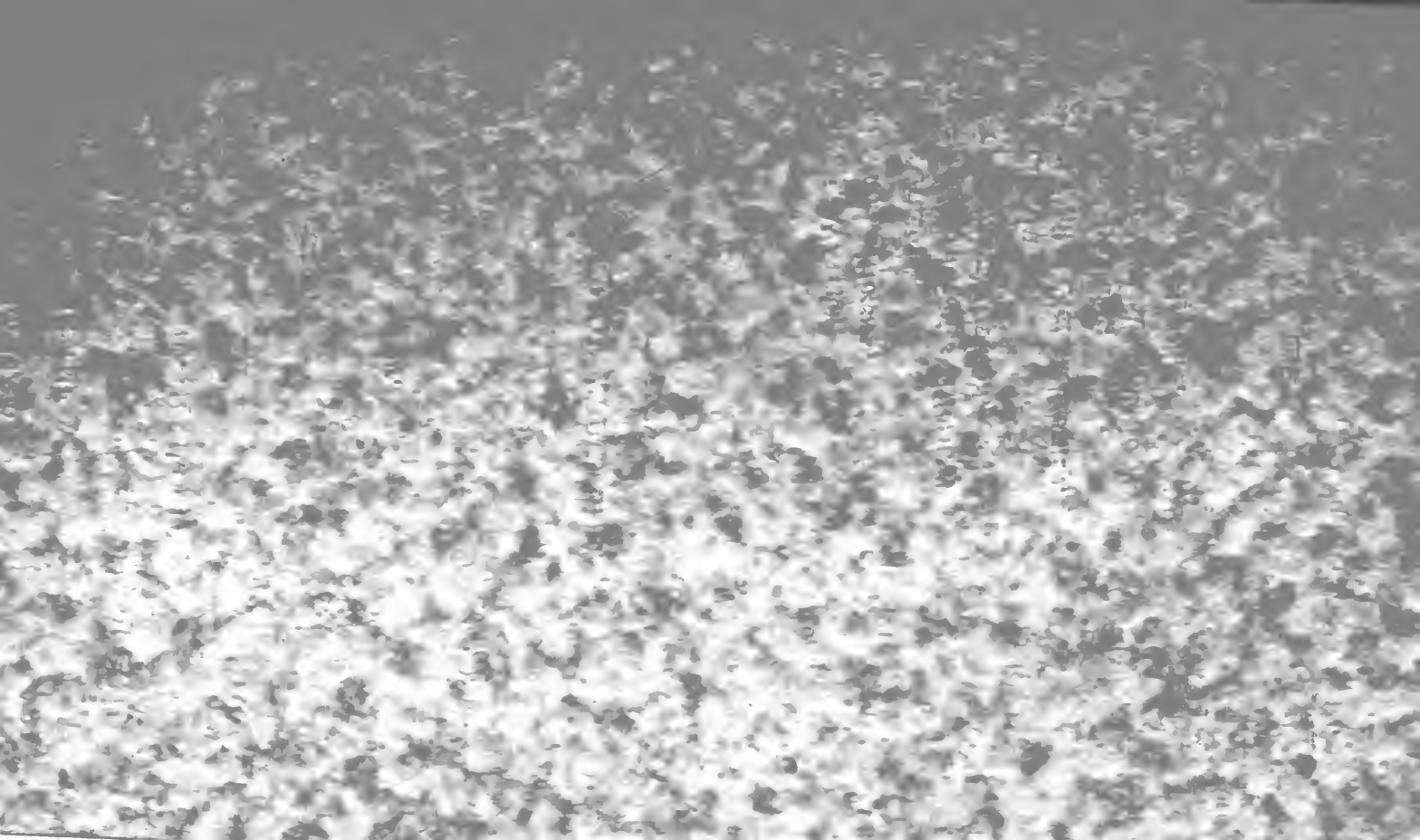

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No. 14356

IN THE

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VERN GEORGE DAVIDSON,

Appellant,

vs.

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Appellee.

BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on July 8, 1953, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the Armed Forces of the United States. [Tr. 3-4.]

On July 27, 1953, the appellant was arraigned and entered a plea of not guilty. On November 18, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable Harry C. Westover, without a jury. On November 30, 1953, appellant was found guilty as charged in the indictment.

[Tr. 6-14.] On December 7, 1953, appellant was sentenced to three years' imprisonment, and judgment was so entered. [Tr. 15-16.] Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231 of Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

STATUTE INVOLVED.

The indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.
STATEMENT OF THE CASE.

The indictment returned on July 8, 1953, charges that the defendant was duly registered with Local Board No. 89, that he was thereafter classified I-A and notified to report for induction into the Armed Forces on October 17, 1952; and that the defendant thereafter knowingly failed and refused to be inducted into the Armed Forces of the United States. [Tr. 3-4.]

On July 27, 1953, appellant appeared for arraignment and plea represented by J. B. Tietz, Esquire, before the Honorable Peirson M. Hall, United States District Judge, and entered a plea of not guilty. On November 18 and 20, 1953, trial was held before the Honorable Harry C. Westover, United States District Judge, without a jury. On November 30, 1953, appellant was found guilty as charged in the indictment, and on December 7, 1953, was sentenced to three years' imprisonment. Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence.

B. The District Court erred in convicting appellant and entering a judgment of guilty against him.

C. The District Court erred in refusing to permit the appellant to explain the answers he gave to the Court's questions.

IV.
STATEMENT OF THE FACTS.

On September 16, 1948, Vern George Davidson registered under the Selective Service System with Local Board No. 89, Los Angeles County, California. He was born on August 6, 1929, and was nineteen years old at the time of registration. He gave his occupation as "student."

On October 7, 1948, Davidson filed with Local Board No. 89 SSS Form 100, "Classification Questionnaire." In that Questionnaire he signed Series XIV and after his signature he affixed an asterisk and wrote, "See note attached." The note said:

> "It will be noted that I have signed Series XIV. I would like to make my position clear. I do conscientiously object to war and to conscription for any reason, but, my beliefs are not religious, they are basically political. As a political objector I shall resist this totalitarian rule by my own country as I would resist it in any other country. My position is briefly stated in the attached newspaper article by myself. If after considering these facts the Board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the Board with the understanding that my objectuons [*sic*] are not religious but political."

There follows a letter from the appellant which he had sent to the *U. C. L. A. Daily Bruin.*

The Local Board mailed appellant SSS Form 150, "Special Form for Conscientious Objectors," which was received by the Local Board on February 27, 1950. In Series II of that form appellant was asked, "Do you believe in a Supreme Being?" He checked the answer, "No." With the special form for conscientious objectors appellant included another statement of his beliefs:

> "* * * I do not believe in the existence of a Supreme Being. My allegiance is not to any god or country, it is to humanity as a whole. * * * This cannot be classified, then, as religious objection to war. If my objections are criminal because they are based on rationality instead of superstition, then it must be so, but I will object and I will refuse to do military service. * * * My references are not to substantiate any religious beliefs but rather my humanitarian and philosophical views."

On July 12, 1950, appellant was classified I-A by a vote of 3 to 0, and on July 13, 1950, SSS Form 110, "Notice of Classification," was mailed appellant.

On July 26, 1950, the Local Board received a letter from appellant restating his views and requesting an appeal of his classification. Although the ten-day period for appeal had passed, the Local Board honored his request, and on August 15, 1950 forwarded appellant's file to the Appeal Board. Meanwhile, appellant had taken an Armed Forces physical examination and had been found acceptable for military duty.

On appeal, appellant's case was referred to the Department of Justice who conducted an investigation and hearing. On January 8, 1951, the Department of Justice wrote the Appeal Board recommending that appellant be not classified as a conscientious objector.

On February 13, 1951, appellant was classified I-A by the Appeal Board by a vote of 5 to 0, and on February 19, 1951, was mailed SSS Form 110, "Notice of Classification."

On February 19, 1951, appellant was mailed SSS Form 252, "Order to Report for Induction," but induction was postponed four days later because appellant was a student.

On August 29, 1951, appellant was again classified I-A by a vote of 2 to 0, and SSS Form 110, "Notice of Classification," was mailed the same date.

On September 7, 1951, Form C-190 was mailed appellant, ordering him to report for induction on September 18, 1951. On September 10, 1951, a letter of appeal was received, and on September 13, 1951, induction was postponed. On September 14, 1951, appellant's file was forwarded to the Appeal Board.

On appeal, the matter was again referred to the Department of Justice. On this occasion no hearing was conducted. On July 29, 1952, the Department of Justice wrote the Appeal Board recommending that appellant be not classified as a conscientious objector.

On August 19, 1952, appellant was classified I-A by the Appeal Board by a vote of 4 to 0, and on August 21, 1952, was mailed SSS Form 110, "Notice of Classification."

Meanwhile, the Local Board had received a request from appellant and from the Socialist Party requesting a deferred classification of II-A for appellant. On September 17, 1952, the Local Board reviewed appellant's case and determined not to re-open it, by a vote of 2 to 0. On September 18, 1952, appellant and the Socialist Party were advised of the Local Board's decision.

On October 1, 1952, appellant was mailed SSS Form 252, "Order to Report for Induction," ordering him to report on October 17, 1952. Thereafter appellant requested a postponement of inductment, which was denied. On October 17, 1952, appellant reported for induction as ordered, but refused to be inducted into the Armed Forces of the United States.

V.

ARGUMENT.

A.

On Appeal From His Classification of August 29, 1951, the Defendant Was Not Entitled to an Investigation and Hearing Conducted by the Justice Department.

The provisions concerning conscientious objectors in the Universal Military Training and Service Act of 1948 are found in Title 50, App., United States Code, Section 456(j), which provides in pertinent part:

> "Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * * Any person claiming exemption from combatant training and service because of *such* conscientious objections shall, if *such* claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. * * * the appeal board shall refer any *such* claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing." (Emphasis added.)

The statute does not say that when *any* claim for a conscientious objector's classification is made the matter shall be referred to the Department of Justice. It provides that any person claiming an exemption because of *"such* conscientious objections" is entitled to the special procedure. (Emphasis added.) Similar language is used in the Selective Service regulations. Section 1626.25 (32 C. F. R. 1626.25) relates to the procedure on appeal when a question of a conscientious objector's classification is involved. The language used throughout that section is, "if the registrant has claimed, *by reason of religious training and belief,* to be conscientiously opposed to participation in war in any form." (Emphasis added.)

Further, it is apparent from a reading of the statute that the purpose of the investigation and hearing by the Department of Justice is to test the character and good faith of a registrant, or, as some courts have expressed it, to determine if he is a "conscientious" conscientious objector. This being the purpose, it follows that an investigation and hearing are not required where the claim for a conscientious objector's classification *on its face* falls outside the limits of the statute.

Thus, before a registrant is entitled to the special procedures in Section 6(j) of the Universal Military Training and Service Act, he must at least assert that his objections to military training and service *are based on religious training and belief.*

Did appellant make such a claim? Appellant filled out SSS Form No. 100, "classification Questionnaire," and signed Series XIV, "Conscientious Objection to War." After his signature he attached an asterisk and made the notation, "See note attached." [Ex. 1, p. 15.] Attached was the following note [Ex. 1, p. 11]:

"* * * My beliefs are not religious, they are basically political. As a political objector I shall resist this totalitarian move by my own country as I would resist it in any other country. * * * If after considering these facts the Board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the Board with the understanding that my objections are not religious but political."

Thereafter, in February, 1950, appellant completed and filed SSS Form No. 150, "Special Form for Conscientious Objector." [Ex. 1, p. 20.] Under Series I, "Claim for Exemption," appellant claimed neither the exemption from all armed forces duty, nor the one for combatant training only. Under Series II, "Religious Training and Beliefs," appellant was asked the following question: "Do you believe in a Supreme Being?" Appellant checked the answer, "No." Attached to the special form for conscientious objectors was the defendant's statement of his beliefs:

"I am not a member, or would I be considered a follower of any religion or religious sect. I do not believe in the existence of a Supreme Being. My allegiance is not to any god or any country, it is to humanity as a whole. * * * This cannot be classified, then, as religious objection to war. If my objections are criminal because they are based on rationality instead of superstition, then it must be so, * * * My references are not to substantiate any religious beliefs but rather my humanitarian and philosophical views."

After appellant was classified I-A, he wrote the Board on July 24, 1950 [Ex. 1, p. 27]:

"* * * I have explained before that as a socialist, as a member of the Socialist Party, I hold a duty to humanity which I will not subjugate for the duty

> to a state. * * * If ever the use of force by one individual is justified, it can only be when the individuals concerned have decided rationally that they should indulge in the use of force, it is never justified as mass, unrational action. * * * You ask us to slaughter Korean peasants because the U. S.'s support of an insufferable government against an equally corrupt government in its game of chest [*sic*] with Russia over the future of the world has resulted in an imperialist war. You ask us to serve—contrary to the opinion of must [*sic*] world government—against the legitimate government of China in support of Nationalist China. * * * You ask us to serve as an imperialist force of intimidation against the rest of the world. This is a duty that I, as a free human being and a Socialist, refuse to accept."

It is clear from the defendant's own language that he did not make "such a claim" as would entitle him to an inquiry and hearing by the Department of Justice when his request for a conscientious objector's classification was denied. He does not believe in a Supreme Being. His objections to war are not religious. His objections to war are political, sociological and humanitarian. He objects to this particular war as "imperialist"—not a ground for exemption. *United States v. Kanter,* 133 F. 2d 703. His statements specifically exclude the possibility that in addition to being political, philosophical and humanitarian, they might be based upon religious training and belief in relation to a Supreme Being. He could not have better included himself in the group *specifically excluded by Congress* had he taken the statute and copied its words. Appellant's claim was invalid on its face.

A somewhat similar situation existed in *Berman v. United States,* 156 F. 2d 377. In that case the court said at page 381:

> "Whether or not the triers of fact thought appellant's objections to war were conscientious is not decisive of this case. Even if the evidence should compel the finding that he was conscientious, * * * he could not succeed in his appeal. There is not a shred of evidence in the case to the effect that appellant relates his way of life or his objection to war to any religious training or belief."

What the court said in that case is equally true in this one. All can agree that appellant is conscientious in his beliefs, and yet, assuming that to be a fact, he could not prevail as a conscientious objector because he does not relate his beliefs to religious training or to a Supreme Being. In the *Berman* case there was a dissenting opinion, and that dissent is based upon the fact that the registrant had signed the appropriate series on the Classification Questionnaire in which he claimed to be a conscientious objector by reason of religious training and belief. In the present case even this objection is met, for at the time appellant signed Series XIV in the Classification Questionnaire, he attached thereto a note saying that his beliefs were not religious but were political.

The fact that a hearing was granted and held in the first appeal, and granted and cancelled on the second appeal, did not change appellant's rights under the law. His rights were determined by the state of the record at the time he appealed, and the Board's action could neither increase nor diminish those rights, as the District Court said [T. R. p. 95]:

> "The fact that defendant was granted a hearing (to which, under the regulations, he was not entitled) which was subsequently cancelled, being merely voluntary on the part of the government, did not in any way affect the defendant's substantive rights."

B.

Appellant Was Not Entitled to Answer the Adverse Recommendation Made by the Department of Justice to the Appeal Board.

On both the first and second appeal the Department of Justice recommended to the Appeal Board that the claim of appellant for a conscientious objector's classification be denied. Appellant complains that he was not given opportunity to answer the adverse recommendations by the Department of Justice. However, appellant was not entitled to a hearing and recommendation at all, *supra* Point A, and it follows that whether he had an opportunity to answer the adverse recommendation is totally immaterial.

The Government does not concede that such a right exists. It is established that exemption by reason of religious training and belief is not a constitutional right.

United States v. MacIntosh, 283 U. S. 605;
Girouard v. United States, 328 U. S. 61.

The privilege not to bear arms comes from Congress.

Tyrrell v. United States, 200 F. 2d 8.

Only such rights of exemption and appeal exist as are granted by Congress. Neither Congress, in the Selective Service Act of 1948, nor the Selective Service regulations, grant a registrant the right to answer the recommendation of the Department of Justice. Indeed, the recommendation is advisory only, and the appeal board is not bound to follow it.

United States v. Nugent, 346 U. S. 1.

Further, the requirements of due process are fully met when, before the hearing officer, the registrant is advised of the adverse evidence against him and given an opportunity to refute it.

United States v. Nugent, supra.

C.

The Trial Court Properly Quashed the Investigative Reports of the Federal Bureau of Investigation.

The F.B.I. reports were totally immaterial to any issues presented at the trial. The purpose of the F.B.I. reports are to advise the hearing officer of information which may assist him in determining the character and good faith of the objection of a registrant who claims a conscientious objector's classification. Referring again to the argument submitted in Point A of this brief, we can assume that the appellant is sincere in everything he states to the Local Board, but Congress has specifically excluded the beliefs he asserts as a grounds for a conscientious objector's classification. In the letter of recommendation from the Department of Justice dated July 29, 1952 [Ex. 1, p. 64], the Department states that appellant's answers in the Selective Service Questionnaires, "clearly show that his objections to war are not religious but are political and philosophical." These are practically the appellant's own words which he submitted to the Local Board. What the F.B.I. reports reveal could be of no possible aid to the Appeal Board in deciding appellant's case. It simply did not make any difference whether he was sincere in his beliefs or not.

D.

Appellant Was Not Denied Due Process by the Local Draft Board.

Appellant urges that he was denied due process by the failure of the Local Draft Board to post a list of advisors to registrants in the Local Board Office. The testimony of Colonel Hartwell [T. R. p. 43] reveals that there are 145 individuals in Los Angeles County who are known as "registrars," and 48 local draft boards. Selective Service Regulation 1604.41 describes the duties of an advisor "to advise and assist registrants in the preparation of questionnaires and other Selective Service forms, and to advise registrants on other matters relating to their liabilities under the Selective Service law." The testimony of Colonel Hartwell reveals that these duties are performed by individuals in California known as "registrars." In addition, the Clerks and Government Appeal Agents are available to advise registrants. A change in title, or the failure to post names could not deny appellant due process. One need only look at appellant's Selective Service file to realize that he is a person who was fully capable of reading, understanding, and completing the Selective Service forms, and it is clear that he understood his liabilities under the law. Nowhere can it be shown that appellant lost or waived some right he had because he was not properly advised concerning it. On examination [T. R. p. 53] appellant admitted that he had never consulted with the people at his Local Board, asked them for advice, or inquired where he might get advice. The most that can be said of the failure to have something known as "advisors" and to have their names posted is that it is an irregularity, a harmless error, which in no way affected the substantial rights of appellant.

In appellant's brief at page 33 he quotes Judge Peirson M. Hall in the case of *United States v Kariakian,* No. 23223, S. D. California, Jan. 13, 1954. Even this very brief extract from the comments of Judge Hall reveal that he was not passing upon the question of advisors to registrants under SSR 1604.41, but rather was stating that a registrant is entitled to be advised that he has the right to request a fair summary of the adverse evidence before a hearing officer of the Department of Justice.

E.

The Trial Court Properly Excluded the Testimony of the "Interpreters" Offered at the Trial to Interpret the Beliefs of the Appellant.

In appellant's brief at page 38, in the last paragraph, he quotes the following offer of proof in regard to the testimony of the two ministers:

> "This witness would give the opinion that he also (referring to appellant)—although the defendant denies it—he also believes in a Supreme Being."

In other words, appellant offered to show at the trial that although he personally does not believe in a Supreme Being, he has available two men who will testify that he does. Basically, the question is not so much what appellant believes, but what he said he believes, and the Local Board is surely entitled to take appellant at his word.

In *Berman v. United States,* 156 F. 2d 377, the Court said, in reference to the phrase "by reason of religious training and belief,"

> "We think the latter phrase must be regarded as a definite limitation on the scope of the exemption and cannot be deprived of its effectiveness by specious

reasoning that something which to its user is more acceptable than some other thing is therefore the same thing."

At page 381 in the *Berman* case the Court says:

"* * * No matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute."

And at page 382:

"We may add with propriety that to sustain appellant's thesis, we should, in effect, be deciding that the exemption from military service read into the statute runs to all who sincerely entertain conscientious objections to participation in war. Should we come to that conclusion, the phrase 'by reason of religious training and belief' would have no practical effect whatever."

In *George v. United States,* 196 F. 2d 445, this Court said:

"* * * It is evident that the definition which the Congress introduced into the 1948 Amendment comports with the spirit in which 'religion' is understood generally, and the manner in which it has been defined by the courts. It is couched in terms of the relationship of the individual to a Supreme Being, and comports with the standard or accepted understanding of the meaning of 'religion' in American society."

The *Berman* case also involved an attempt to "interpret" appellant's beliefs as religious beliefs. In that case the issue had apparently not been raised at the trial. Certain

appendices were included in appellant's brief in that case, which consisted of letters about the appellant, and in two instances opinions by ministers that the appellant really was religious. Another letter was from a college professor, about which the Court said:

> "The letter, as it seems to us, amounts in the last analysis to the professor's conclusion that a conscientious belief in any social theory, with the object of benefit to man, is a religious belief."

That is, in effect, what we have in this case. As appellant himself stated, although he does not believe in God, although his objections to war are not religious, there are some people who would interpret his beliefs as being otherwise. This is clearly immaterial and the District Court properly ruled that such evidence was inadmissible.

F.

The Supreme Being Clause in the Selective Service Act of 1948 Is Constitutional.

The claim that laws requiring compulsory military service are unconstitutional has often been raised. In *Richter v. United States,* 181 F. 2d 591, this Court said:

> "This claim, in one guise or another, was advanced again and again during the first World War, as well as the second World War, and was uniformly rejected by the courts."

That case, however, did not pass upon the Supreme Being clause in the 1948 Act, and it is only that clause which is being attacked herein. The matter of the Supreme Being clause was really settled in the *Berman* case when the Court held that "religion" meant a duty and responsibility to an authority higher and beyond any worldly one; in effect, a duty to a deity. Thus, the Supreme Being

Amendment to the 1940 law was really only a congressional expression of the existing law which had been declared constitutional.

Richter v. United States, supra.

Appellant first urges that the Supreme Being clause offends the Sixth Article of the Constitution:

> "* * * No religious test shall ever be required as a qualification to any office of public trust under the United States."

He argues that because many conscientious objectors prefer prison to surrendering their scruples they become felons and, therefore, ineligible for public office. But the *duty* of military service is there for all to perform, and only by the grace of Congress are certain groups excluded. There is no constitutional right to exemption from military service on any ground.

Richter v. United States, supra.

It goes without saying that this does not constitute a religious test for public office, for the law does not require religious conformity—it only requires that those whom Congress has not exempted from military service perform their duty to serve. Any objector to military service can readily avoid conviction of a felony by the simple device of entering the military service.

Appellant next asserts that the Supreme Being clause offends the First Amendment of the Constitution: "Congress shall make no law respecting an establishment of religion * * *." Appellee does not intend to engage

in a battle of semantics with appellant over the meaning of the words "religion" and "Supreme Being." The matter of the meaning of those words and their constitutionality was settled in the *Berman* and *George* cases, *supra*. In the *George* case the Court cited the principle that there is no constitutional right to exemption from military service because of conscientious objection or religious calling. It then said:

> "This being so, there is brought into play the familiar principle that whatever the government, state or federal, may take away altogether, it may grant only on certain conditions. Otherwise put, whatever the government may forbid altogether, it may condition even unreasonably. Outstanding in this domain are the cases dealing with intoxicating liquors. * * *
>
> * * * * * * * *
>
> "The latest illustration of this familiar norm of constitutional law is the Federal Tort Claims Act, 28 U. S. C. A., Paragraphs 1346(b), 1402(b), 2674. As this involves a waiver of sovereign immunity, Congress could constitutionally provide that no jury should be had, 28 U. S. C. A., Paragraph 2402, despite the provisions for jury trial in the Seventh Amendment to the Constitution.
>
> "In sum, as the exemption from participation in war on the ground of religious training and belief, can be granted or withheld by the Congress, the Congress is free to determine the persons to whom it will grant it, and may deny it to persons whose opinions the Congress does not class as 'religious' in the ordinary acceptance of the word. * * *
>
> * * * * * * * *

"So it is evident that the definition which the Congress introduced into the 1948 Amendment comports with the spirit in which 'religion' is understood generally, and the manner in which it has been defined by the courts. It is couched in terms of the relationship of the individual to a Supreme Being, and comports with the standard or accepted understanding of the meaning of 'religion' in American society. * * *

* * * * * * * *

"Political, sociological, philosophical and ethical grounds for opposing war are so distinct from opposition induced by religious training and belief that, aside from the considerations just adverted to, the Congress could very well recognize the latter as a ground for exemption and refuse sanction to the former. Even if we were not dealing with the plenary power to provide for the defense of the Country, such classification would meet all the accepted tests of due process."

And in *Rase v. United States,* 129 F. 2d 204, 210:

"No question of religious liberty, in any true sense, is here involved, and the zealous and ill-advised pursuit of a martyr role is not, by the sanction of the Constitution, permitted to imperil national safety. * * *."

VI.

CONCLUSION.

The District Court properly denied the Motion for Judgment of Acquittal at the close of all the evidence.

The District Court properly found the defendant guilty and there is substantial evidence to support that finding.

There was no error of law in the ruling of the District Court in refusing to permit the appellant to give immaterial explanations of his answers to the Court's questions.

Respectfully submitted,

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No. 14356

United States Court of Appeals

For the Ninth Circuit

VERN GEORGE DAVIDSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

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TABLE OF CASES AND AUTHORITIES CITED

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United States Court of Appeals

For the Ninth Circuit

VERN GEORGE DAVIDSON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14356

Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of the Judgment entered by the Court on December 27, 1954, affirming the judgment of the Court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to a feature of the decision wherein he believes the Court may be convinced its result is incorrect.

The decision should be reheard and for the following reason:

> The decision is on a single point and the Selective Service regulation used to support the conclusion reached on this point is inapplicable.

The decision is on the single point that no second Hearing Officer Hearing was required because the second appeal was "abortive" [slip opinion page 5].

The Court concluded that the second appeal was abortive because (a) it was not *from* a classification, but *for* a postponement of induction and because (b) it came too late in that it postdated an order to report for induction; 32 Code of Federal Regulations, §1626.2(d) is given as authority.

With respect to

(a) This Court has always held that a liberal construction is required of a Selective Service registrant's phraseology in letters to his draft board: *Cox vs. Wedemeyer,* 192 F. 2d 920, 923; *Talcott vs. Read,* ..... F. 2d ....., No. 14218, dec. 10/23/54, slip opinion p. 3; other courts have held likewise: See *Hufford vs. United States,* 103 F. Supp. 859, 862; *Berman vs. Craig,* 107 F. Supp. 529, 531 (Aff. by 3 Cir., 207 F. 2d 888); *Ex parte Fabiani,* 105 F. Supp. 193, 148.

It cannot be doubted that appellant's letter of "Appeal" was one asking his local board for relief. The board so understood it and also understood that an administrative appeal was his remedy. The board's construction of his letter should not be rejected unless illegal. This brings us to the next problem.

(b) A registrant's untimely request for an administrative appeal is not a nullity. If the local board believes the registrant is asking for and should have an appeal it may waive the tardiness of the request. The very section cited by the opinion, §1626.2(d), states that the local board may honor a late appeal. Since the sub-section (d) itself makes the Order to Report

for Induction the deadline, and in the same paragraph gives the local board authority to honor a late appeal it is clear that Davidson's local board exercised its authority and intended him to have an appeal.

Furthermore, the slip opinion, page 5, states:

> "The record submitted to the appeal board contained nothing new which could affect its prior decision. An alert hearing officer first saw the mistake and advised Davidson that he was not entitled to a second hearing because he had already had one."

This "alert hearing officer" did not predicate his refusal either on the basis that there was nothing new to be considered or that there had been a mistake by the local board in granting an untimely request for an appeal. His sole (and stated) basis for refusal was that Davidson had already had *one* hearing.

The measure of a registrant's rights is not "one" hearing by a Hearing Officer anymore than it is "one" hearing by his local board.* This is particularly true in Davidson's case because of the lapse of time between the hearing given and the hearing withheld.

In addition this Honorable Court was wrong in concluding that there was "nothing new" to be considered by the Hearing Officer. In a young man's life two years can make a great deal of difference in

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*"1625.13 RIGHT OF APPEAL FOLLOWING REOPENING OF CLASSIFICATION.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification."

his thinking, experience and attitude. The *purpose* of the hearing officer hearing is to bring out the *current* facts of the registrant's claims of conscientious objections to war. When either the local board or an appeal board classifies a registrant the decision is to be made on current facts. *Hull vs. Stalter,* 7th Cir., 151 F. 2d 633.

Congress intended that genuine religious scruples be respected. Can it be argued that the sole purpose of the Hearing Officer Hearing is to show up sham? Is not it true that part of his duty is to pierce the fog that surrounds some youngsters' verbiage? If a registrant's true beliefs always really were (or have become) "religious" is it not the Hearing Officer's function to overlook rebellious semantic disavowals made many years before and make recommendation of classification in accord with the current facts?

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ,
Attorney for Appellant.

No. 14357

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JACK WARREN BRADLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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No. 14357

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JACK WARREN BRADLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [11][1]

[1] Numbers appearing in brackets herein refer to pages of the printed Transcript of Record, except when "F" precedes the numbers. In that event the numbers appearing within brackets refer to the draft board file, received in evidence and marked as Government's Exhibit 1. Papers in the draft board file are numbered by a written longhand figure which is encircled.

The district court made no specific findings of fact. These were waived. No reasons were stated by the court in writing for the judgment rendered. The court below stated no reasons for the conviction. [36]

The trial court found appellant guilty. [37] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [13]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about May 18, 1953, appellant "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [3-4]

Appellant pleaded not guilty. [4] He waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [5]

After receiving evidence and hearing testimony, the court considered a motion for judgment of acquittal made by appellant. [7, 10, 36] The motion was denied. [37] The appellant was convicted. [36] He was sentenced to serve a period of eighteen months in the custody of the Attorney General. [11-12] Notice of appeal was timely filed. [13] The transcript of the record (including the statement of points relied upon) has been timely filed in this Court.

THE FACTS

Jack Warren Bradley was born September 18, 1932. [F 1, 11] He registered with his local board on September 20, 1950. [F 1-2] On September 14, 1951, he notified the local board of a change of address. [F 5] On September 24, 1951, the local board mailed the classification questionnaire to the wrong address. [F 3, 13-15] On October 5, 1951, the registrant wrote the local board that he had misplaced the questionnaire and requested another one. [F 13, 16] The local board mailed a duplicate questionnaire on October 8, 1951, along with special form for conscientious objector. [F 4, 6]

The classification questionnaire was filed on October 26, 1951. [F 6] He indicated he was a minister of religion but was not serving regularly as such and had not been formally ordained. [F 8] His occupation was repairing rails and distributing tie plates for the Great Northern Railroad. [F 9-10] He completed elementary school and junior high school and completed three years of high school but did not graduate. [F 11] He signed series XIV showing he was a conscientious objector. [F 12]

He filed a special form for conscientious objector on October 26, 1951. [F 18] He showed he was opposed to both combatant and noncombatant military service. [F 18] He believed in a Supreme Being and had obligations that were superior to those arising from any human relation. [F 18] He described the nature of his beliefs, showing he was not to take part in world affairs but must serve God rather than his country. [F 18] The basis of his religious training and belief was given. He relied on his mother for religious guidance. [F 19] He listed his preaching activity as a demonstration of the consistency of his religious convictions. [F 19] He gave his educational background, his various occupations and residences. [F 19-22] He gave the names of his parents and indicated his father's religion was Christian and his mother's was Jehovah's Witnesses.

[F 22] He was a member of Jehovah's Witnesses and Watchtower Bible and Tract Society, the legal governing body of his church. [F 22] He stated that such religious organization does not participate in any kind of war either combatant or noncombatant. [F 22] He listed references to prove his sincerity. [F 23]

On January 22, 1952, the local board placed him in Class I-A. [F 13, 27] This classification denied his conscientious objector status and made him liable to unlimited military service. He appealed and requested a personal appearance. [F 13, 30-34] Accompanying the letter was an affidavit proving his status as one of Jehovah's Witnesses. [F 28-29] The local board notified him to appear on February 11, 1952. [F 13, 35] He appeared, his case was reopened and he was again placed in Class I-A. [F 13, 36] The board made a memorandum finding that he had said he had made a pledge to serve God and could not move away from it and that he could not serve both God and country. [F 36-38] The local board notified him of the new classification. [F 13, 39] He appealed from such classification. [F 13, 40-42] On February 18, 1952, the file was forwarded to the appeal board. [F 13] The appeal board reviewed the file and made an entry which required the case to be referred to the Department of Justice for inquiry and hearing. [F 13] The file was forwarded to the United States Attorney on April 7, 1952. [F 43]

A secret FBI investigation and report thereon was made. There was a hearing before a hearing officer of the Department of Justice. [F 48-49] [32-32] The hearing officer made his report to the Department of Justice in Washington. The Department made a recommendation to the appeal board on March 19, 1953, against the conscientious objector claim because appellant would fight in self-defense, and his conscientious objector position was his own philosophy, and his objections were not deep-rooted religious convictions. [F 49] The Department of Justice recommended that the appeal board classify the appellant in I-A. [F 49]

On April 9, 1953, the appeal board classified him in I-A, upon the recommendation of the Department of Justice. [F 50] He was notified of such classification on April 13, 1953. [F 13] He was thereupon ordered to report for induction on May 18, 1953. [F 13, 51] He reported as ordered. [25]

At the induction station he was told to take a new physical examination. He was fingerprinted. He was asked if he was a conscientious objector and didn't believe in fighting. [25] He was then sent to another room where he gave his name and address. Then he was turned over to a sergeant who told him to write out a statement that he refused to be inducted into the armed services. [26] Appellant did so. [53, 55, 65] The sergeant told him the penalty for not submitting to induction. [26] The appellant was never processed to the point of being requested to submit to induction. He was not put into the line-up of selectees. His name was not called nor was he requested to take the symbolic one step forward which is the induction ceremony whereby he would have been formally requested to enter the armed forces of the United States. [26]

At the trial appellant testified that if he had been given an opportunity of taking the one step forward or going through the induction process, he would not have stepped forward or submitted to induction. [32-33]

QUESTIONS PRESENTED AND HOW RAISED

I.

At the induction station appellant was never requested to take the one step forward. The induction officials did not put him in the line-up with the other selectees, call out his name and request him to submit to induction. [25-26] He was merely requested to sign a statement that he refused to submit to induction. [26-32] When he signed this statement he was discharged. [25-26, 32-33] He testified that

had he been requested to go through the induction ceremony, he would have refused to do so. [32-33]

In the motion for judgment of acquittal it was contended that the appellant was never asked to submit to induction and therefore he is not guilty of refusing to submit to induction as charged in the indictment. [9] The motion for judgment of acquittal was denied. [6]

The question presented here, therefore, is whether the undisputed evidence shows that the appellant did not refuse to submit to induction as charged in the indictment.

II.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He established that his obligations to the Supreme Being were superior to those owed to the state. He showed that his beliefs were not the result of political, sociological or philosophical views, but were based solely on the Word of God. [F 8-23] The local board placed him in Class I-A, which made him liable for service in the armed forces. [F 13] The local board forwarded the file to the appeal board. The file was referred to the Department of Justice. After a hearing on the conscientious objector claim of appellant the hearing officer recommended I-A classification. The Department of Justice concurred and recommended to the appeal board that appellant be placed in Class I-A. [F 48-49] The appeal board classified appellant in I-A, making him liable for unlimited military service. [50]

It was contended in the motion for judgment of acquittal that the denial of the conscientious objector status was arbitrary and capricious. [7] The motion was denied. [6]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the re-

commendation of the Department of Justice and of the hearing officer, as well as the classification by the appeal board, were without basis in fact, arbitrary and capricious.

III.

The case of appellant was referred to the Department of Justice by the appeal board for appropriate inquiry and hearing. [F 43] There was a secret FBI investigation and report made. [F 48-49] There was a hearing before the hearing officer. The Department of Justice made its recommendation to the appeal board. [F 48-49] The Department recommended against the conscientious objections because the appellant would fight in self-defense. The Department illegally and contrary to the record indicated to the appeal board that appellant's conscientious objections were based on his own philosophy and not on deep-rooted religious training and belief. [F 48-49] The appeal board adopted the recommendations of the Department of Justice and denied the conscientious objector classification. [F 50]

In the motion for judgment of acquittal it was contended that the recommendation of the Department of Justice was inconsistent with the facts. [9] The motion was denied. [6]

The question presented here, therefore, is whether there was a denial of procedural due process of law because the report and recommendation of the Department of Justice to the appeal board is inconsistent with the facts and the law.

IV.

The final recommendation of the Department of Justice to the appeal board against the appellant's conscientious objector claim was mailed to the appeal board without notice to the appellant of the contents. [F 48-49] The appellant did not have an opportunity to answer the adverse recommendation before the appeal board acted on it. [29]

The appeal board, on April 9, 1953, classified appellant I-A, denied the conscientious objector claim and accepted

and relied on the recommendation of the Department of Justice without giving appellant an opportunity to answer the adverse recommendation. [F 50]

In the motion for judgment of acquittal it was contended that the procedure denied appellant's right to be heard before the appeal board finally classified him. It was contended that this procedure deprived him of his rights guaranteed by the act and Constitution. [10]

The question presented here, therefore, is whether the making of the adverse recommendation by the Department of Justice and the acceptance of it by the appeal board without giving appellant an opportunity to answer it before he was denied the conscientious objector claim deprived him of his procedural rights contrary to due process of law.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting appellant and in entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

The undisputed evidence shows that the appellant was not given an opportunity to go through the induction ceremony and therefore he is not guilty of refusing to submit to induction.

The army regulations provide for the induction ceremony. Following the physical examination and selection of registrants for induction, the registrants are put through

an induction ceremony whereby each registrant is put in a line-up, his name is called, and he is requested to step forward. He is told before being requested to step forward that the taking of the one step forward constitutes his induction into the armed forces.—SR 615-180-1, 23.

The undisputed evidence shows that appellant was not given an opportunity to undergo the induction ceremony. Instead when it was found out that he was a conscientious objector he was asked if he objected to induction. He said he did. He was then requested to sign a statement refusing to be inducted and he was then discharged without being put through the induction ceremony.

The trial court should have sustained the motion for judgment of acquittal because there was no evidence that the appellant refused to undergo the induction ceremony, since appellant was never given an opportunity to go through the induction ceremony.

The trial court should have sustained the motion for judgment of acquittal.

POINT TWO

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* N. D. Cal. S. D., May 28, 1953, 112 F. Supp. 618; *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Graham,* W. D. Ky., December 19, 1952, 109 F. Supp. 377; *United States* v. *Pekarski,* 2d Cir., October 23, 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., December 7, 1953, 203 F. 2d 329; *Jewell* v. *United States,* 6th Cir., December 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., December 23, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., January 8, 1954, 209 F. 2d 366; *United States* v. *Lowman,* W. D. N. Y., January 15, 1954, 117 F. Supp. 595; *United States* v. *Benzing,* W. D. N. Y., January 15, 1954, 117 F. Supp. 598; *Weaver* v. *United States,* 8th Cir., February 19, 1954, 210 F. 2d 815; *Lowe* v. *United States,* 8th Cir., February 19, 1954, 210 F. 2d 823; *United States* v. *Rodriguez,* D. P. R. February 24, 1954, 119 F. Supp. 111; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th

Cir., May 7, 1954, — F. 2d —; *United States* v. *Hagaman,* 3rd Cir., May 13, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —.

The trial court should have sustained the motion for judgment of acquittal.

POINT THREE

Appellant was deprived of a fair hearing before the appeal board because the recommendation of the Department of Justice was based on his belief in self-defense; and the conclusion that appellant based his objections on a personal moral code is inconsistent with the facts.

The recommendation of the Department of Justice recited that appellant believed in self-defense. This was apparently considered to be a basis for the denial of the conscientious objector status. The Department of Justice also recommended to the appeal board that appellant's beliefs were the result of a personal moral code and not based on deep-rooted religious training and belief. This recommendation is contrary to the facts.

The making of the recommendation that appellant be denied his conscientious objector status because of his belief in self-defense is contrary to law. It is basis for a judgment of acquittal.—*Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., October 23, 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., December 7, 1953, 203 F. 2d 329; *United States* v. *Hartman,* 2d Cir., January 8, 1954, 209 F. 2d 366.

When the Department of Justice concluded that appellant's conscientious objections were the result of a personal moral code, this flew in the teeth of the record and was inconsistent with the facts. The recommendation, therefore, deprives appellant of his rights under the law.—*United States* v. *Everngam,* D. W. Va., October 31, 1951, 102 F. Supp. 128; *Annett* v. *United States, supra.*

The trial court should have sustained the motion for judgment of acquittal.

POINT FOUR

Appellant was denied his rights to procedural due process of law when the appeal board considered and acted upon the adverse recommendation made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendation.

The recommendation by the Department of Justice was adverse to appellant. The appeal board was told by the Department of Justice that appellant was not a conscientious objector. The recommendation was considered by and relied upon by the appeal board without giving appellant an opportunity to answer it before the appeal board made the final classification.

The denial of the right to answer an unfavorable recommendation is a deprivation of procedural due process of law.—*Kwock Jan Fat* v. *White,* 253 U. S. 454, 459, 463, 464; *Morgan* v. *United States,* 304 U. S. 1, 22, 23; *Degraw* v. *Toon,* 2d Cir., 151 F. 2d 778.

The trial court should have sustained the motion for judgment of acquittal.

ARGUMENT

POINT ONE

The undisputed evidence shows that the appellant was not given an opportunity to go through the induction ceremony and therefore he is not guilty of refusing to submit to induction.

The army regulations provide for the induction ceremony. Unless and until the selectee has been put through the induction ceremony he cannot be said to be in the army. —*Billings* v. *Truesdell,* 321 U. S. 542, 559; *Corrigan* v. *Secretary of the Army,* 9th Cir., March 5, 1954, 211 F. 2d 293.

The induction ceremony is prescribed by the army regulations. (SR 615-180-1) This regulation requires the induction officers to line up all the selectees in a line-up. Then each

selectee is told to take one step forward as his name is called. He is informed that this constitutes his induction into the armed forces. If the selectee refuses to step forward the induction officer is required by the regulation to take the selectee out of the line-up. The officer then explains to him his obligation to submit to induction, and if he refuses to do so he will be prosecuted. The induction officer is then required to request the selectee to stand at attention and take one step forward when his name is called again. If he again refuses to take the one step forward the induction officer is required to take a statement from him to the effect that he refuses to submit to induction. Then the selectee is released.

The undisputed evidence in this case shows that appellant complied with the order to report for induction so far as required by law. He went to the induction station. He went through the physical examination. He followed each order given to him at the induction station. When it was discovered that he was a conscientious objector and planned on not submitting to induction the induction officer did not complete the procedure prescribed by the army regulations. He stopped the process and did not complete the procedure. All that was done is that a statement was taken from appellant that he refused to submit to induction. Appellant was not given an opportunity to refuse to submit to induction. The induction officers did not complete the process. Appellant cannot be found guilty of stopping the induction process. He is not charged with having refused to complete the process. He is charged with having refused to submit to induction. The undisputed evidence shows that he was never subjected to the induction ceremony.

Before the duty of the appellant could bo established there was a duty that had to be performed by the induction officers. They were duty bound to complete the process and put appellant into the line-up or at least to formally

request him to submit to induction. He was never given the opportunity to refuse to submit to induction.

Appellant has been convicted of refusing to submit to induction because he signed a statement that he would not be inducted.

The situation here is analogous to the conviction of a man for murder. A defendant can be indicted for murder but he cannot be convicted of the offense merely because he made a statement that he was going to commit the murder. It is necessary for a shot to be fired with malice aforethought and that death result from the shot in order for the corpus delecti to be established. The corpus delecti in the offense here was never established. The appellant never committed the offense he was charged with in the the indictment. He was never brought to the point of being requested to submit to induction. All that happened was that the induction officials did not complete the process. They merely took a statement from him and released him after he stated he refused to be inducted. The mere statement that a selectee refuses to submit to induction is not equivalent to the offense of refusal to submit to induction. The corpus delecti was not established in this case.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

POINT TWO

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of Title I of the Universal Military Training and Service Act of 1951 (50 U. S. C. § 456(j), provides, in part, as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a

> Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

Section 1622.14 (a) of the Selective Service Regulations (32 C. F. R. § 1622.14 (a)) provides:

> "In Class I-O shall be placed every registrant who would have been Classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is not one iota of documentary evidence that in any way disputes the appellant's proof submitted showing that he was a conscientious objector. The statement of facts made by the hearing officer of the Department of Justice and the summary of the FBI investigative report do not contradict but altogether corroborate the statements made by the appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscien-

tious objector when first denied by the appeal board, pursuant to 50 U. S. C. App. § 456(j). If there were any adverse evidence, certainly agents of the FBI in their deep and scrutinous investigation would have turned it up and produced it to the hearing officer to be used against the appellant. The summary supported the appellant's claim.

There is no question whatever on the veracity of the appellant. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact, but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file before the appeal board showed that the appellant was concientiously opposed to participation in combatant and noncombatant military service. He showed: (1) he believed in the Supreme Being, (2) he was opposed to participation in combatant and noncombatant military service, (3) he based his belief and opposition to service on religious training and belief as one of Jehovah's Witnesses, (4) such stand did not spring from political, sociological or philosophical beliefs. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption

from combatant and noncombatant military training and service.

It has been held by many courts of appeal that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389 (holding that if there is no contradiction of the documentary evidence showing exemption as a minister that there is no basis in fact for the classification) also applies in cases involving claims for classification as conscientious objectors. —*Weaver* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —; *contra United States* v. *Simmons,* 7th Cir., June 15, 1954, — F. 2d —.

Recently in *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —, after quoting from *Dickinson* v. *United States,* 346 U. S. 389, the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeal. In those cases the appellants, like appellant here, were Je-

hovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of the courts with which the holding of the court below (that there was a basis in fact for denial of the classification) directly conflicts are: *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —. And these cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objections are concerned.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

POINT THREE

Appellant was deprived of a fair hearing before the appeal board because the recommendation of the Department of Justice was based on his belief in self-defense; and the conclusion that appellant based his objections on a personal moral code is inconsistent with the facts.

The recommendation was against appellant by the Department of Justice because appellant believed in the use of force for self-defense. This recommendation was an illegal one. It destroyed the classification given by the appeal board.—*Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., October 23, 1953, 207 F. 2d 930.

The recommendation was made against appellant by the Department because he based his objections not on religious training and belief but a personal moral code. There is not one iota of evidence in the record that appellant did not base his claim on religious training and belief. All the papers as well as the recommendation of the Department of Justice show that appellant was one of Jehovah's Witnesses and had the belief as other of Jehovah's Witnesses that he could not participate in combatant and noncombatant military service. The statement made by the Department of Justice that appellant's claim for classification as a conscientious objector is based on a personal moral code is absolutely false. It conflicts with the record. That appellant may have told the hearing officer that his conscientious objections came as a result of personal study of the Bible and discussion with others does not constitute a personal moral code. What the statute deals with is conscientious objections that are based on religious training and belief. The fact that the conscientious objections here may have come from personal study is immaterial. Every conscientious objector reaches his objections as a result of his own personal decision after study. If the recommendation of the Department of Justice is to be accepted

and followed in this case just because the conscientious objections were reached as a result of personal study, then every conscientious objector could be said to have no objections because they came from a personal code. Congress did not intend to outlaw religious objectors who reached their conclusions as a result of personal study.

The process followed by the Department of Justice is contrary to the facts and realities.

The recommendation of the Department of Justice was illegal. It became a chain in the administrative proceedings when the appeal board classified appellant in the manner that the Assistant Attorney General recommended. The classification by the appeal board was an adoption of the recommendation by the Department of Justice. The illegal defect in the recommendation tainted the entire proceedings in the draft boards and made them illegal after the recommendation was filed with the appeal board.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact appellant to be a conscientious objector, was arbitrary and capricious because the basis for the rejection of appellant's evidence was on illegal and irrelevant grounds.—*Linan* v. *United States,* 9th Cir., 1953, 202 F. 2d 693.

The report of the hearing officer was adopted by the Department of Justice in its recommendation. The appeal board followed the recommendation of the Department of Justice. While the recommendation was only advisory, the fact is that it was accepted and acted upon by the appeal board. The appeal board concurred in the conculsions reached by the hearing officer and the Department of Justice. It gave appellant a I-A classification and denied him the conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error. —See *United States* v. *Everngam,* D. W. Va., Oct. 31, 1951, 102 F. Supp. 128.

It is respectfully submitted that the recommendation by

the Assistant Attorney General to the appeal board, which was accepted by the board, is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report for induction was based.

POINT FOUR

Appellant was denied his rights to procedural due process of law when the appeal board considered and acted upon the adverse recommendation made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendation.

The recommendation of the Department of Justice was against appellant. The appeal board was told that the conscientious objector claim should be denied. Appellant was not given an opportunity to answer the recommendation before the appeal board made the final classification. This classification thereby denied the conscientious objector claim. The appeal board accepted and followed the recommendation by the Department of Justice.

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25) provides:

> *"Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> "(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to

noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States

Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Action by Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) or paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the nation health, safety, or interest. If the Department of justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

> "(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendaton of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26) provides:

> "*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.
>
> "(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

The holding by the court below that there was no deprivation of due process of law is out of harmony with many decisions. The courts have uniformly held that where an administrative determination is made upon an adverse recommendaton by a government agent it is necessary that the person concerned be advised of the governmental proposal

and be heard upon it before the final determination. In *Brewer* v. *United States*, 4th Cir., April 5, 1954, 211 F. 2d 864, the court held that consideration by the appeal board of the secret FBI investigative report, inadvertently sent to the board by the Department of Justice, deprived him of due process of law. The court found that the registrant was denied the right to answer the FBI report before the appeal board. The court, however, said erroneously that a registrant was given the right by the regulations to see and answer the recommendation of the Department of Justice to the appeal board. Contrary to that statement are the regulations which do not grant the right. The holding by the court below on this point is also in direct conflict with *Degraw* v. *Toon,* 2nd Cir., 151 F. 2d 778, and *United States* v. *Balogh,* 2d Cir., May 23, 1946, 157 F. 2d 939, vacated 329 U. S. 692, and later affirmed 2nd Cir., April 7, 1947, 160 F. 2d 999.

The holding by the court below that action on secret reports of a trial examiner or agency hearing officer without an opportunity to reply before final decision is made by the administrative agency is not a violation of due process of law conflicts with *Kwock Jan Fat* v. *White,* 253 U. S. 454, 459, 463, 464; *Morgan* v. *United States*, 304 U. S. 1, 22, 23; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91-92, 93; *United States* v. *Abilene & S. Ry. Co.,* 265 U. S. 274, 290; and *Oregon R. R. & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 524.

In the case of *Morgan* v. *United States,* 304 U. S. 1, the Court said: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants." (304 U. S. at page 19) Identically the same secret proposal was made here by the Department of Justice, and the appeal board acted upon it in this case without the knowledge of the ap-

pellant in time to protect himself. The star-chamber procedure prescribed by the regulations is a denial of due process of law. It conflicts with the "fair and just" provisions of Section 1(c) of the act, and the Fifth Amendment to the United States Constitution.

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

CONCLUSION

Wherefore appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to enter a judgment of acquittal and discharge the appellant.

Respectfully,

Hayden C. Covington,

124 Columbia Heights,
Brooklyn 1, New York,

Counsel for Appellant

July, 1954.

No. 14357

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK WARREN BRADLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK WARREN BRADLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on October 21, 1953, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the Armed Forces of the United States. [T. R.[1] pp. 3-4]

On December 7, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on January 12, 1954.

On January 13, 1954, trial was begun in the United States District Court for the Southern District of California by the Honorable Peirson M. Hall, without a jury,

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[1]"T. R." refers to Transcript of Record.

and the appellant was found guilty as charged in the indictment. [T. R. pp. 6-7]

On February 1, 1954, the appellant was sentenced to imprisonment for a period of 18 months and judgment was so entered. [T. R. pp. 11-12] Appellant appeals from this judgment. [T. R. p. 13]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

STATUTES INVOLVED.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment—No. 23190-CD Criminal
[U.S.C., Title 50, App., Sec. 462—
Selective Service Act, 1948]

"The Grand Jury charges:

"Defendant Jack Warren Bradley, a male person within the class made subject to selective service under the Universal Military Training and Selective Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 125, said board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on May 18, 1953, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [T. R. pp. 3-4]

On December 7, 1953, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Peirson M. Hall, United States District

Judge, and entered a plea of not guilty to the offense charged in the indictment.

On January 13, 1954, the case was called for trial before the Honorable Peirson M. Hall without a jury, and on January 13, 1954, appellant was found guilty as charged in the indictment. [T. R. pp. 6-7]

On February 1, 1954, the appellant was sentenced to imprisonment for a period of 18 months in a penitentiary. [T. R. pp. 11-12]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The district court erred in failing to grant the Motion for judgment of acquittal duly made at the close of all the evidence.

B. The district court erred in convicting the appellant and entering a judgment of guilty against him.

IV.

STATEMENT OF THE FACTS.

On September 20, 1950, Jack Warren Bradley registered under the Selective Service System with Local Board No. 125, Los Angeles, California. [F. 1][2]

On October 26, 1951, the appellant filed with Local Board No. 125, SSS Form 100, Classification Questionnaire. [F. 6-13]

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[2]"F" refers to appellant's Draft Board File, Government Exhibit No. 1. At the bottom of each page appears an encircled handwritten number identifying the page in the draft board file.

SSS Form 150, Special Form for Conscientious Objector, was furnished Bradley, and he completed this form and filed it with Local Board No. 125. Bradley claimed to be a conscientious objector because of his religious training and belief. He was classified 1-A on January 22, 1952, and was mailed SSS Form 110, Notice of Classification.

On January 30, 1952, Bradley requested a personal appearance before the Local Board and at the same time appealed his classification. A personal appearance before the Local Board was granted for February 11, 1952. On February 11, 1952, Bradley appeared before the Local Board and was continued in Class 1-A. [F. 36]

Bradley was granted a hearing before the Hearing Officer of the Department of Justice. The Hearing Officer concluded that Jack Warren Bradley was not a conscientious objector by reason of any deep-rooted religious conviction, but that, if his claim was sincere, it was only an outgrowth of his own personal philosophy. He recommended a 1-A classification. [F. 48-49.]

On March 13, 1953, Bradley was classified 1-A by the Appeal Board and he was advised of this action.

On May 4, 1953, SSS Form 252, Notice to Report for Induction, was mailed to Bradley, ordering him to report for induction into the Armed Forces of the United States on May 18, 1953.

On May 18, 1953, Jack Warren Bradley refused to be inducted into the Armed Forces of the United States. [F. 52-55]

V.

ARGUMENT.

POINT ONE.

Replying to Appellant's Assignment of Error, the Government Contends That the Appellant's Refusal to Submit to Induction in Writing Constitutes a Refusal to Submit to Induction Within the Purview of the Indictment and the Appellant Was Properly Convicted.

Reference is made to the Memorandum of Opinion filed by the Trial Judge in the case of *Duron v. United States,* No. 14303, now on appeal to this Court. Judge Westover stated on page 17 of the Transcript of Record in the *Duron* case:

> "When a conscientious objector states emphatically that he will not be inducted into the armed services of the United States, it seems rather useless, and an empty gesture, to require him to stand on his feet and request that he take one step forward when his name and the branch of service into which he has already refused induction are announced.
>
> "Defendant herein is charged in the Indictment with knowingly failing and refusing to be inducted into the armed forces of the United States; and this Court knows of no more emphatic manner in which he could have announced his refusal to be so inducted than by giving the written statement, in his own handwriting, found in his selective service file. The defendant is found guilty as charged."

The appellee contends that the action of the appellant of acknowledging his refusal to submit to induction in writing [F. 53] constitutes a refusal to submit to induction into the armed forces within the purview of the

charge contained in the Indictment and the appellant was properly convicted.

In *Billings v. Truesdell,* 321 U. S. 542, at page 557, the Supreme Court stated:

> "He who reports to the induction station but refuses to be inducted violates Section 11 of the Act clearly as one who refuses to report at all. . . . The Selective Service Regulations state that it is the "duty" of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished,' and 'to submit to induction.' Sec. 633.21(b). Thus it is clear that a refusal to submit to induction is a violation of the Act rather than a military order. The offense is complete before induction and while the selectee retains his civilian status."

POINT TWO.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class 1-A and Its Action Was Neither Arbitrary nor Capricious.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling.

> *Richter v. United States,* 181 F. 2d 591 (9th Cir.);
> *Tyrrell v. United States, supra.*

Congress has granted exemptions and deferments from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service system. The duty to classify and to grant or deny exemptions rests upon the draft boards,

local and appellate. The burden is upon the registrant claiming an exemption or deferment to establish his eligibility therefor to the satisfaction of the local or appellate board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Every registrant is presumed available for military service and every registrant who fails to establish his eligibility for exemption or deferment to the satisfaction of a local or appellate board is placed in Class 1-A. Title 32, C. F. R., Section 1622.10.

United States v. Schoebel, supra.

The classification by the Local Board and thereafter by the Appeal Board, made in conformity with the regulations was final.

Estep v. United States, 327 U. S. 114;
Cox v. United States, 332 U. S. 442.

The Selective Service file of the appellant indicates that the Local and the Appellate Boards considered the claims for exemption by the appellant. Both boards rejected the appellant's claim based on the information presented to them. It is noted that the appellant personally appeared before the Local Board and the Hearing Officer at the Department of Justice hearing.

At the personal appearance and hearing conducted by the hearing officer, the demeanor, good faith and sincerity of the appellant in his claims for a conscientious objection exemption were observed.

The recommendation of the Hearing Officer based on his observations and the record was that the appellant's

claims be denied. [F. 36-37] In *United States v. Simmons,* June 15, 1954, ... F. 2d ..... (7th Cir.), the Court stated in this regard that:

> "The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These, at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the Board with the impossible task of rebutting a presumption of the validity of every claim based oft times on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption, we may not further inquire as to the correctness of the board's order."

Basis in fact further exists in the selective service file [Govt. Ex. 1] of the appellant. On pages 48-49 facts which could constitute a basis for the appeal board's classification include the following:

(1) The appellant's claims for a conscientious objection exemption stems from his own personal philosophy. [F. 49]

(2) The appellant's claims are neither based on religious training nor religious belief. [F. 49]

(3) The appellant lives in and operates "Brandeis Camp", an outstanding Jewish camp. It is noted that the Jewish doctrines are diametrically opposed to the appellant's personal philosophy of non-participation in war. [F. 36, 48-49]

(4) Appellant believes in the use of force in self-defense [F. 49], but failed to complete his SSS Form 150, Series II, Question 5, stating the limitations or circumstances thereunder.

The appellee submits that this point is related to appellant's next point; accordingly, appellee respectfully directs the Court's attention to its third point, *infra.*

POINT THREE.

There Was No Denial of Due Process of Law Before the Department of Justice Hearing Officer or the Appellate Board of the Selective Service System.

The statute granting the conscientious objector exemption reads as follows:

> "Title 50, App., U. S. C., Section 456(j).
> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is necessary, however, for a person who claims exemption from combatant and/or noncombatant training, to have his claim sustained by the Selective Service System. Thus, a registrant who desires a conscientious objector exemption must satisfy the Selective Service System as

to the validity of his claim for exemption in the following particulars:

(1) He must be conscientiously opposed to war in any form; and

(2) His conscientious objections must be based upon religious training and belief; and

(3) His sincerity, character and good faith assertion of his claims are judged; and

(4) He must make a timely and bona fide claim.

To aid in the determination of the subject's conscientious objections and the validity thereof, the registrant is given a hearing before the Hearing Officer of the Department of Justice. At this time, the Hearing Officer is able to observe the demeanor of the registrant, test his credibility and his good faith and the sincerity of his conscientious objection claims. The registrant is also given an opportunity to be heard and present new evidence.

The appellant infers that the record must substantiate the denial of conscientious objection exemption. The appellee submits that the burden is on the claimant of the exemption to prove by a preponderance of the evidence that he is entitled to such an exemption.

United States v. Simmons, supra.

Furthermore, appellant asserts that the Department of Justice recommendation was based on the appellant's belief in self-defense. This is not true in that the letter of the Department of Justice indicates that the advisory recommendation was based on consideration of the entire file and the record. [F. 49]

POINT FOUR.

There Was No Error in the Department of Justice Inquiry and Advisory Recommendation to the Appeal Board.

Congress has provided for exemption from service in the armed forces of the United States by reason of religious training and belief. However, there is no constitutional right to such an exemption.

United States v. MacIntosh, 283 U. S. 605;
Girouard v. United States, 328 U. S. 61.

Title 50, App., U. S. C., Section 456(j), provides in pertinent part:

> ". . . any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned. . . ."

Under the authority of the above statute, Selective Service Regulations were adopted (Title 32, C. F. R., Sec. 1626.25) and provision is made for an investigation and report by agents of the Federal Bureau of Investigation. These reports are forwarded to a Hearing Officer for his use in the hearing he conducts with respect to the character and good faith of the claims of conscientious objection of each registrant claiming exemption therefor.

Prior to such a hearing, the Hearing Officer mails a Notice of Hearing and Instructions to registrants whose claims for exemptions as conscientious objectors have been appealed. These instructions provide in part:

> "2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing, and before the date set for the hearing, the Hearing Officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat the claim of the registrant, such request being granted to enable the registrant more fully to answer and refute at the hearing such unfavorable evidence."

Since there is no constitutional right to exemption because of religious training and belief, any claimed denial of due process must necessarily, then, be based upon a variance from the procedures established by Congress or by administrative officials under a proper delegation of powers. There was no such variance from the established procedures in this case, and it is noted that these procedures have been held to satisfy the requirements of the Selective Service Act in the case of *United States v. Nugent,* 346 U. S. 1.

Furthermore, procedural irregularities or omissions which do not result in prejudice to the appellant are to be disregarded.

Martin v. United States, 190 F. 2d 775;
Atkins v. United States, 204 F. 2d 269.

VI.
CONCLUSION.

Appellant was properly classified by the Selective Service System and the classification of 1-A was with basis in fact.

There was no denial of due process of law in the classification of the appellant.

There was no error of law in the rulings of the Trial Court and therefore the conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
Assistant United States Attorney,

HIRAM W. KWAN,
Assistant United States Attorney,

Attorneys for United States of America,
Appellee.

No. 14361

United States
Court of Appeals
for the Ninth Circuit

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.–6-15-54

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Transcript of Record

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-15-54

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

STANLEY FLEISHMAN,
6331 Hollywood Blvd.,
Hollywood 28, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
RICHARD A. LAVINE,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles, Calif.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16522-HW

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California; and DOE I Through DOE IV,

Defendants.

COMPLAINT FOR INJUNCTION TO ENJOIN DEFENDANTS FROM REFUSING TO DELIVER MAIL AND FOR DECLARATORY RELIEF

Comes now plaintiff, and complains of defendants, and each of them, and for cause of action alleges:

I.

That this action arises under 39 U. S. C. Sections 255 and 259a; Article I, Section 8 of the Constitution of the United States; and Articles I, IV, V, VI, VII and VIII of Amendments to the Constitution of the United States.

II.

That the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

III.

That at all times herein mentioned and concerned, defendant Otto K. Olesen was, and is, the duly appointed, qualified and acting Postmaster of the City of Los Angeles, State of California, [2*] and is a citizen and resident of the Southern District of California. That in his capacity as Postmaster said defendant is charged with the duties of administering and managing the United States Post Office in and for said city, and is in charge of and responsible for the receipt and distribution of material sent through the United States mail for delivery in said city.

IV.

That defendants Doe I through Doe IV are sued herein under fictitious names for the reason that their true names are unknown to plaintiff at this time. That said defendants are employees of the Post Office Department of the United States in said City of Los Angeles and are working under the supervision and direction of defendant Otto K. Olesen, to whom they are responsible for the performance of their duties. That plaintiff will ask leave of this honorable Court to amend this complaint and insert their true names herein when they have been ascertained.

V.

That plaintiff V. E. Stanard has heretofore been engaged in the business of distributing and selling through the mail certain publications, "pin-up"

*Page numbering appearing at foot of page of original Certified Transcript of Record.

pictures and novelties under the firm name and style of Male Merchandise Mart. That plaintiff has duly published and recorded with the Office of the County Clerk of the County of Los Angeles, State of California, a Certificate of Fictitious Firm Name in accordance with the provisions of Section 2466 of the Civil Code of the State of California. That there is attached hereto, as Exhibit "A" hereof, a true and correct copy of said certificate. That plaintiff has invested substantial sums of money well in excess of the sum of $3,000.00 in said venture which has sustained irreparable damage, and the loss of which is threatened in its entirety by the action of the defendants as hereinafter alleged. [3]

VI.

That on or about the 1st day of March, 1954, without prior notice and without the holding of a hearing, defendants and each of them, under orders of the Post Office Department of the United States, arbitrarily, capriciously, wrongfully and unlawfully seized, impounded and refused to deliver to plaintiff any mail addressed to Male Merchandise Mart, 16887 West Branch, Hollywood, California, plaintiff's business address. That, as hereinbefore indicated, no hearing was held, nor was any proceeding had prior to the seizure of plaintiff's mail, and to the date hereof defendants, and each of them, wrongfully and unlawfully and in the total absence of any authority granted by law or statute, or otherwise, so to do, continue to keep impounded all such

mail addressed and directed to plaintiff, and refuse to deliver same, or any portion thereof, to plaintiff.

VII.

That two days thereafter, to wit, March 3, 1954, there was served upon plaintiff under date of March 1, 1954, a certain "Order" issued by the Post Office Department of the United States, directing defendant Otto K. Olesen to impound and refuse to deliver plaintiff's mail pending determination of a hearing to be held in the Post Office Department, a true and correct copy of which purported "Order" is attached hereto as Exhibit "B" hereof and, by reference thereto, hereby made a part hereof as if at this point set forth in full.

VIII.

That there was simultaneously served upon plaintiff a "Notice of Hearing" and "Complaint," true and correct copies of which are attached hereto as Exhibits "C" and "D," respectively, hereof and, by reference thereto, hereby made a part hereof as if at this point set forth in full. [4]

IX.

Plaintiff herein duly filed her Answer to said Complaint, generally denying the allegations thereof and particularly denying that said merchandise and novelties, or any thereof, were obscene, lewd, lascivious and/or indecent. That a hearing was held in Washington as of said 17th day of March, 1954, at which hearing the Post Office Department failed to introduce in evidence any merchandise sold, or

offered for sale, by plaintiff. That to the date hereof no decision has been reached by the Post Office Department on said hearing, and the matter is presently under submission. That, nevertheless, defendants, and each of them, continue to keep plaintiff's mail impounded, and to the date hereof persist in their refusal to deliver to plaintiff mail matter addressed to her.

X.

That in the event said hearing should be decided adversely to plaintiff, the Post Office Department will issue its order from the Postmaster General of the United States to defendants, which order, by its terms, would direct defendants, and each of them, to return all mail matter, whether registered or not, arriving at the Post Office in the City of Los Angeles, State of California, directed to the plaintiff V. E. Stanard and/or Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, to the postmasters at the offices at which they were originally mailed, with the word, "unlawful" written or stamped on the outside thereof; such mail matter so returned to such postmasters, to be by them returned to the senders; and would forbid said defendants, or any thereof, to pay any postal money order or postal note drawn to the order of plaintiff; and would direct defendants to inform the remitter of any such postal money order or postal note that payment thereof has been forbidden. [5]

XI.

That by reason of the wrongful and unlawful im-

pounding of plaintiff's mail by defendants, and each of them, as aforesaid, and the wrongful and unlawful refusal of defendants to deliver plaintiff's mail, as aforesaid, and by reason of the additional fact that defendants threaten to return to return to senders all of said impounded mail, plaintiff has suffered, is now suffering, and will suffer irreparable loss and damage; that by reason of the foregoing, plaintiff's business has been irreparably damaged and his property seized without due process of law.

XII.

That said purported order of impound, said proceedings heretofore held before the Post Office Department and the order proposed to be issued thereunder are unlawful, void and in violation of plaintiff's constitutional rights for the following reasons:

(a) That there is no basis, statutory or otherwise, for the impounding of mail prior to hearing and pending determination of hearing; that the action of the Post Office Department in impounding plaintiff's mail is capricious, arbitrary, unlawful, and constitutes an unlawful seizure of plaintiff's property and operates in violation of the Fifth Amendment of the Constitution of the United States.

(b) That at said hearing in Washington, D. C., the Post Office Department failed to produce or introduce in evidence any merchandise whatsoever, sold or offered for sale by plaintiff, but nevertheless the hearing examiner refused, on motion, to dismiss

the proceedings for lack of evidence notwithstanding that, as aforesaid, no competent evidence was produced or introduced which would justify a finding of violation by plaintiff of any of the statutes herein involved. That plaintiff will pray leave of court to introduce as an additional exhibit in [6] this action, after it has been received, a copy of the transcript of said proceedings.

(c) That none of the material sold or offered for sale by plaintiff is obscene, lewd, lascivious and/or indecent as a matter of law.

(d) That said proceedings are unlawful and void by reason of the fact that they operate to deprive plaintiff of liberty and property without due process of law. That the statute pursuant to which said proceedings were taken violate the rights granted plaintiff by the Constitution of the United States, Article I, Section 8; Article I, Section 9, Clause 3; Articles I, IV, V, VI, VII and VIII of Amendments to the Constitution of the United States.

(e) That the Post Office Department is without jurisdiction to censor or pass upon the obscenity of books or published material which are among the items of merchandise handled by plaintiffs; that books, novels and similar publications are not encompassed by 39 U. S. Code 259a or any other Code sections upon which the Post Office proceedings are based.

For each of the reasons hereinabove stated and set forth, the acts of defendants, and each of them,

in refusing to deliver plaintiff's mail, are unlawful and deprive plaintiff of her property and right to do business without due process of law.

XIII.

That unless defendants, and each of them, are enjoined and restrained from committing the acts hereinabove alleged, and are ordered by this court to release to plaintiff all such impounded mail forthwith, plaintiff will continue to be irreparably damaged; that said defendants are continuing and threatening to continue to permit and perform said acts, refuse to release to plaintiff any of her impounded mail, and threaten to return such mail [7] matter to the senders, as hereinabove set forth, all to plaintiff's irreparable loss, harm and damage.

XIV.

That as the result of the foregoing, an actual controversy exists between plaintiff and defendants within the jurisdiction of this court, and this court should declare the rights and other legal relations between the parties hereto.

Wherefore, plaintiff prays judgment against defendants herein, and each of them, as follows:

(1) That the rights and legal relations of the parties be determined as provided by the United States Judicial Code, 28 U. S. C. Sections 2201 and 2202.

(2) That a temporary restraining order, preliminary and permanent injunction be issued herein,

directed to the defendants herein, and each of them, ordering said defendants to forthwith deliver up to plaintiff all mail matter of any kind or nature whatsoever impounded by them; enjoining them from in any manner failing or refusing to deliver, in the regular course of mail, any and all mail matter addressed to plaintiff under the name V. E. Stanard and/or Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, or anywhere else; and from in any manner carrying out or enforcing the purported "Order" of impound attached hereto as Exhibit "B" hereof; or from enforcing such order as may be issued by the Post Office Department pursuant to said purported hearing.

(3) For a declaration by this court that 39 U. S. C. 259a is unconstitutional in its entirety and void in its application to plaintiff in this action.

(4) For costs of suit herein incurred; and

(5) For such other and further relief as to this court [8] may seem meet and equitable in the premises.

CAIDIN, BLOOMGARDEN & KALMAN,

By /s/ STANLEY R. CAIDIN,
Attorney for Plaintiff. [9]

EXHIBIT "A"

Duplicate Copy for Publication in the.....

Certificate of Business
Fictitious Firm Name

The undersigned does hereby certify that she is conducting a mail order business at Box 16887, West Branch, City of Los Angeles 46, County of Los Angeles, State of California, under the fictitious firm name of (write name in full). A separate filing is necessary for each different firm name. Male Merchandise Mart—Sailor Jock's Plain Wrapper Club and that said firm is composed of the following person, whose name and address are as follows, to wit: (state names, street addresses and cities of residence in full). V. E. Stanard, 11064½ Strathmore Drive, Los Angeles, 24, California.

Witness my hand this 15th day of February, 1954.

/s/ V. E. STANARD.

State of California,
County of Los Angeles—ss.

On this 15th day of February, A. D. 1954, before me Paul V. Parker, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appear V. E. Stanard known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ PAUL V. PARKER,
Notary Public in and for
Said County and State.

My commission expires November 11, 1954.

The Pico Post,
February 18, 25,
March 4, 11, 1954.

Notes—The California Civil Code (Section 2466) requires filing of this certificate with the County Clerk and its publication for four successive weekly insertions in some newspaper in the county. An affidavit of publication must be filed by the publisher with the County Clerk within 30 days of completion of the publication. Send all documents for filing to Los Angeles Newspaper Service Bureau, Inc., 224 W. First St., Phone MA 2541. If original certificate is sent for filing, enclose two dollars for county clerk's filing fee. All checks for two-dollar filing fee should be made payable to County Clerk. [10]

EXHIBIT B

H. E. Docket No. 2/292

In the Matter of

The Complaint That Albert J. Amateau and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART, and
MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California,

and

RAREPIX COMPANY,
RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through the Mails in Violation of 39 U. S. Code, Section 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

ORDER

The Solicitor for the Post Office Department having this day filed a complaint alleging upon probable cause that Albert J. Amateau and V. E. Stanard are conducting an unlawful business through the mails in violation of 18 U. S. Code, 1342 and 1461, and of 39 U. S. Code 255 and 259a, and in pursuance thereof are using the fictitious, false or assumed

names and addresses, Male Merchandise Mart and Michael Malone, 16887 West Branch, Hollywood 46, California, and it appearing from the allegations and exhibit comprising said complaint that it has become necessary to determine whether the mail addressed to the aforesaid names and addresses should be delivered to the parties claiming same or whether it should be disposed of pursuant to the provisions of the aforesaid statutes, you are hereby directed to refuse to deliver such mail to the parties claiming same until their identity and the character of the business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon a date which [11] shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order.

/s/ CHARLES R. HOOK, JR.,
Deputy Postmaster General.

To the Postmaster, Los Angeles, California. [12]

EXHIBIT C

Office of the Deputy Postmaster General
Washington 25, D. C.

March 1, 1954.

H. E. Docket No. 2/292

In the Matter of

The Complaint That ALBERT J. AMATEAU and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART, and
MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California,

and

RAREPIX COMPANY,
RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Engaged in Conducting an Unlawful Enterprise Through the Mails as Set Forth in the Attached Complaint.

NOTICE OF HEARING

Transmitted herewith is a copy of the Complaint which has been filed in this proceeding pursuant to the enclosed Rules of Practice. It is recommended

in the Complaint that the appropriate order be issued pursuant to the provisions of the statutes cited therein.

Notice Is Hereby Given that a hearing in the above-entitled proceeding will be held before a Hearing Examiner on March 17, 1954, at 10:00 a.m., in Room 3237, New Post Office Department Building, 12th and Pennsylvania Avenue, N.W., Washington 25, D. C.

If you desire to oppose the issuance of the order recommended in the Complaint an original and three copies of your answer to the Complaint must be filed with the Docket Clerk, Office of the Administrative Assistant to the Deputy Postmaster General, Post Office Department, Washington 25, D. C., on or before March 11, 1954, or you will be deemed to be in default and to have waived hearing and further procedural steps. The requirements for the filing of your answer and your appearance at the hearing are set forth in the enclosed Rules of Practice.

Transmitted herewith also is a copy of the impounding order in this case.

/s/ A. B. STROM,
Administrative Assistant. [13]

EXHIBIT D

H. E. Docket No. 2/292

5/32 Mar. 1, 1954.

In the Matter of

The Complaint That ALBERT J. AMATEAU and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART, and
MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California,

and

RAREPIX COMPANY,
RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through the Mails in Violation of 39 U. S. Code, Section 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

COMPLAINT

The undersigned, Solicitor for the Post Office Department, has probable cause to believe and therefore alleges that V. E. Stanard and Albert J. Amateau of Los Angeles, California, using the fictitious, false or assumed names and addresses Male Mer-

chandise Mart and Michael Malone, at 16887 West Branch, Hollywood 46, California, and Rarepix Company and Rarepix Co., at Campbell Building, Santa Monica and Fairfax, Hollywood 46, California, are conducting, promoting and carrying on by means of the post office establishment of the United States a scheme for obtaining and attempting to obtain remittances of money through the mails for certain articles namely, books, booklets, photographs, motion pictures, playing cards, color slides, and novelties of an obscene, lewd, lascivious, indecent, filthy and vile character, and are depositing or causing to be deposited in the United States mails information as to where, how or from whom the same may be obtained [14] in violation of the provisions of 39 U. S. Code, Sections 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

(1) That public attention is attracted to the said books, booklets, photographs, motion pictures, playing cards, color slides and novelties, and information as to where, how and from whom they may be obtained is furnished by means of circulars which respondents cause to be distributed generally through the mails;

(2) That attached hereto as Exhibit "A" and hereby made a part hereof are photostatic copies of circulars mailed by respondents bearing the following captions: "Most Amazing Offer of Uncensored Books That Dare to Tell the Truth," "Rare Specials," "Naughty Bed-Time Books," "Books on Every Angle of Sex," "Are Ordinary Novels too

Tame for You? Here's Exciting, Intimate Reading That Gives You That Thrill! Pocket-Size Editions," "Sex in Prison," "Wild French Cartoons," "The Flimsey Report," "Racy, Risky Assortment of French Love Stories," "Wow! 'Wolf Deck,'" "Real Old-Time Cartoon Books," "A Cigarette Pack Peep Show," "A Pocket Art Museum," "Party Films," "To Spank or Not to Spank!" "A Pack of Beauty," "Art Slides," "Body in Art," "3rd Dimension Slides" and "Beauty in Bondage;"

(3) That the above-mentioned advertising circulars employed by respondents as aforesaid contain illustrations and descriptive statements which characterize the various articles offered for sale, namely, books, booklets, photographs, motion pictures, playing cards, color slides and novelties as erotically and sexually stimulating and as obscene, lewd, lascivious and indecent, and offer to provide and furnish same through the mails to persons remitting to respondents the sums of money stated in the aforesaid circulars.

Wherefore, premises considered, it is recommended: (a) that the postmaster at Los Angeles, California, be instructed forthwith to withhold from delivery all mail addressed to Male [15] Merchandise Mart, Rarepix Company, Rarepix Co., and Michael Malone at Los Angeles, California, pending a determination as to whether said names are being used for the purpose of carrying on an unlawful enterprise as hereinbefore alleged; (b) that an ap-

propriate order be issued pursuant to the statutes set forth in the caption and first paragraph hereof instructing the postmaster at Los Angeles, California, as to the disposition of mail addressed to Male Merchandise Mart, Rarepix Company, Rarepix Co., Michael Malone and their officers and agents as such, at Los Angeles, California.

/s/ ABE McGREGOR GOFF,
Solicitor.

To the Chief Hearing Examiner of the Post Office Department.

Duly verified.

[Endorsed]: Filed March 19, 1954. [16]

[Title of District Court and Cause.]

AFFIDAVIT OF V. E. STANARD IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

V. E. Stanard, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled matter. That all mail heretofore directed and addressed to this plaintiff under the name Male Merchandise Mart at 16887 West Branch, Hollywood,

California, has, since the first day of March, 1954, been seized and impounded by the Post Office Department in the City of Los Angeles, and withheld from delivery to plaintiff. That since said date, plaintiff has received no mail deliveries whatsoever so addressed and directed to her. That affiant has been advised that all such mail is presently being held under instructions of the Post Office [18] Department.

That affiant is engaged in the mail order business and so long as she fails to receive regular mail deliveries, affiant is thereby deprived of her right to conduct her business and is threatened with, and has sustained, great loss and irreparable damage by reason of the withholding of mail deliveries to her. That affiant's true name is V. E. Stanard. That said name is not a false, fictitious, or assumed name. That there is attached hereto as Exhibits "A" and "B," respectively, hereof, and by reference thereto hereby made a part hereof as if at this point set forth in full, a true and correct copy of affiant's social security card and birth certificate, identifying her by her true name. That affiant, through her attorney, offered to appear at the Post Office Department in Los Angeles to present identification and establish her identity. That she was advised that this would do her no good and that even if she satisfactorily identified herself, that her mail would not be released but would continue to be impounded. That so long as affiant's mail is impounded and deliveries are withheld, affiant is unable to conduct

her business and will continue to suffer and sustain irreparable damage and loss.

/s/ V. E. STANARD,
Affiant.

Subscribed and sworn to before me this 18th day of March, 1954.

[Seal] /s/ STANLEY R. CAIDIN,
Notary Public in and for
Said County and State.

My commission expires August 13, 1957. [19]

EXHIBIT A

[Social Security Card]

Social Security Act
Account Number

359-18-7583

has been established for

Violet Evelyn Stanard

/s/ Violet Evelyn Stanard
Worker's Signature.

[Social Security Board Seal] [20]

Exhibit B

STATE OF MISSOURI
Bureau of Vital Statistics
CERTIFICATE OF BIRTH

1. PLACE OF BIRTH
County of Linn
Township of Marceline
Village of
or City of Marceline
St. No. E. California St.
Ward.
(If birth occurs in a hospital or other institution, give name of same, instead of street and number.)

Registration District No. 502
Primary Registration District No. 4305
File No.
Registered No. 39

2. FULL NAME OF CHILD Violet Eveline ~~Stannard~~ Stannard

3. Sex of Child: Female
4. Legitimate: Yes
5. Twin, triplet, or other? / 6. and Number in order of birth /
To be answered in case of plural births only
7. Date of birth: May 28 (Month) (Day) 1925 (Year)

FATHER	MOTHER
8. FULL NAME: Logan ~~Stannard~~ Stannard	12. FULL MAIDEN NAME: Pearl Jeans
9. P. O. ADDRESS: Marceline, MO.	14. P. O. ADDRESS: Marceline, MO.
10. COLOR OR RACE: White	10a. AGE AT LAST BIRTHDAY: 42 (Years)
15. COLOR OR RACE: White	15a. AGE AT LAST BIRTHDAY: 28 (Years)
11. BIRTHPLACE: Pollock, MO.	16. BIRTHPLACE: Mountain Grove, MO.
12. OCCUPATION: Engineer	17. OCCUPATION: Housewife

18. Number of child of this mother 4 19. Number of children, of this mother, now living 4 20. Born of full term (This Child) Yes

First anesthetic was used in the quest. agno. J.

21. CERTIFICATE OF ATTENDING PHYSICIAN OR MIDWIFE*

I hereby certify that I attended the birth of this child, who was born alive (Born alive or dead) May 28, 1925 at 8:15 P M the date above stated.

*When there was no attending physician or midwife, then the father, mother, householder, etc., should make this return.

(Signature) Jno J. McInerney
Physician
(Physician or Midwife)
Address Brookfield, MO.

22. Given name added from supplemental report _____, 19____
Registrar

23. Filed 6/10, 19 25 Lea Putnam
Registrar

This certificate must be FILED with the Local Registrar within TEN (10) days after birth.

STATE OF MISSOURI } ss.
CITY OF JEFFERSON }

I HEREBY CERTIFY that the above is a true and correct copy of the certificate for the person named therein. The original record being filed in the Central Bureau of Vital Statistics of the State of Missouri is part of the permanent records of said bureau. WITNESS my hand as State Registrar of Vital Statistics and the Seal of the Missouri State Board of Health this date of [redacted]

James A. Kinard
State Registrar of Vital Statistics. Per [redacted]

Endorsed: Filed March 19, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF STANLEY R. CAIDIN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Stanley R. Caidin, being first duly sworn, deposes and says:

That he is an attorney duly qualified to practice, and practicing, before all of the courts of the State of California. That he appeared as counsel for plaintiff in a hearing held as of the 17th day of March, 1954, before the Post Office Department in Washington, D. C.

That at said hearing the Post Office Department failed to produce or introduce in evidence any merchandise sold, or offered for sale, by plaintiff herein. That two witnesses were presented in support of the Post Office Department's case and both of [22] said witnesses admitted on cross-examination that neither of them had ordered or received any merchandise whatsoever from plaintiff herein. That the Post Office Department rested its case solely on the basis of certain advertising and circulars purportedly sent through the mail by plaintiff.

That prior to said hearing affiant personally spoke to Post Office Inspector Ward in Los Angeles and offered to produce his client, V. E. Stanard, for the

purpose of presenting identification to establish that she is not a fictitious person, and that her name is V. E. Stanard. That Inspector Ward told affiant that it would do no good to appear for the purpose of identifying affiant's client, that her mail was being withheld by reason of an order issued from the Department in Washington, and that the mail would not be released by the Post Office in Los Angeles regardless of whether affiant's client appeared to identify herself in accordance with 39 U. S. Code 255.

/s/ STANLEY R. CAIDIN,
Affiant.

Subscribed and sworn to before me this 18th day of March, 1954.

[Seal] /s/ LORRAINE NATHE,
Notary Public in and for
Said County and State.

My commission expires October 30, 1957.

[Endorsed]: Filed March 19, 1954. [23]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

To the Above-Named Defendant Otto K. Olesen, Postmaster of the City of Los Angeles, State of California:

It Is Hereby Ordered that the defendant above named appear before the District Court of the United States for the Southern District of California, Central Division, in the courtroom of the Honorable Harry C. Westover, located in the Federal Building, Los Angeles, California, on the 25th day of March, 1954, at the hour of 10 o'clock a.m., of said day, then and there to show cause, if any you have, why you should not, pending trial of this action, be required to turn over and deliver in the regular course of mail to plaintiff all mail matter directed to said plaintiff at 16887 West Branch, Hollywood, California, or anywhere else, and why you should not be enjoined from refusing to [24] deliver any and all such mail matter as may have been heretofore, or may hereafter be, mailed to plaintiff at said address, or elsewhere, and from enforcing in any respect whatsoever such order or orders concerning the disposition of such mail matter as may have been, or may hereafter be, issued by the Post Office Department of the United States.

Dated this 19th day of March, 1954.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed March 19, 1954. [25]

[Title of District Court and Cause.]

MEMORANDUM

Plaintiff, V. E. Stanard, is engaged in the business of distributing and selling through the mail certain publications, "pin-up" pictures and novelties, under the firm name and style of Male Merchandise Mart. On March 1, 1954, the Solicitor for the Post Office Department filed a complaint, alleging upon probable cause that Albert J. Amateau and V. E. Standard were conducting an unlawful business through the mail in violation of 18 U. S. Code, 1342 and 1461, and of 39 U.S. Code, §255 and §259a. [49]

It appearing from the allegations and from the exhibits comprising the complaint that it was necessary to determine whether the mail addressed to the aforesaid parties should be delivered to them or whether it should be disposed of pursuant to the above-mentioned statutes, an order was addressed to the Postmaster at Los Angeles, California, directing him "to refuse to deliver such mail to the parties claiming same until their identity and the character of the business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon a date which shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order."

Subsequent to receipt of the order the Postmaster refused to deliver to plaintiff any mail addressed to

her, arriving at the Los Angeles Post Office. On March 1, 1954, a notice was given of a hearing to be held before a hearing examiner on March 17, 1954, in the New Post Office Building, Washington, D. C. On March 17, the plaintiff appeared before the examiner in Washington, D. C., and at that time there was presented to the hearing officer certain advertisements which had been sent through the mail by plaintiff by which she solicited orders for certain cartoon books, party films, art books, et cetera. None of the articles offered for sale were presented to the examiner, and no evidence was received that any of such articles had been transported through the mail. However, the advertising pamphlets were sent through the mail, and orders emanating therefrom were transmitted by mail from the sender to Los Angeles, California. The matter was taken under submission by the hearing officer, and up to the present date no decision has been made by the hearing officer as to whether or not plaintiff has violated the statute. [50]

On March 19, 1954, this action was filed by which plaintiff has asked this court to determine the rights and legal relations of the parties, as provided by U. S. Judicial Code, Title 28, §§2201-2202, and that a temporary restraining order and permanent injunction be issued, restraining and enjoining the defendants from impounding the mail belonging to plaintiff herein. It is plaintiff's contention that the Postmaster General cannot make an order impound-

ing her mail until there has been a determination that plaintiff is guilty of a violation of law.

The complaint filed by the Solicitor alleges there is "probable cause" that plaintiff is in violation of the statute. The complaint does not allege plaintiff was violating but alleges only that there is "probable cause" to believe plaintiff to be in violation. Inasmuch as it would take some time to determine whether or not plaintiff is in violation, the Postmaster General (without waiting for such determination), directed the Postmaster at Los Angeles to impound the mail. This, plaintiff alleges, cannot be done.

Plaintiff as authority for her position cites to the court Donnell Mfg. Co. v. Wyman, 156 Fed. 415, and Meyers v. Cheesman, 174 Fed. 783. Counsel for plaintiff asserts these are the only two cases found in the reports dealing with the matter at hand and that each sustains plaintiff's contention that it is impossible for the Postmaster General to impound plaintiff's mail until there has been determination that such mail is unlawful.

The first case above was decided by a District Court in Missouri and the second, by a District Court in Kentucky. Inasmuch as both were decided by District Courts, neither is binding upon this court. [51]

A similar contention was made in Wallace v. Michael D. Fanning, No. 15,499-T, tried by one of the members of this court—the Honorable Leon R. Yankwich—in June, 1953. Judge Yankwich, in his

remarks from the bench, pointed out that the two cases above cited were District Court cases, not binding upon him, and he refused to follow them. The same problem was there presented to the court as is presented here—whether or not the Post Office Department can (under §§255 and 259a), prior to a finding that literature is obscene, make an order impounding such literature. Judge Yankwich ruled:

> "* * *, in my opinion, under the broad powers given by the law to a postmaster under Section 255, relating to fraudulent schemes, and 259-a, relating to obscene literature, that when information reaches the postmaster he may have a reasonable time, while instituting proceedings, to stop the mail temporarily until the order is determined."

The Donnell Mfg. Co., and Meyers cases, supra, were tried in 1907 and 1909, respectively. The Wallace case, tried in 1953, is recent. It has the same standing before this court as the two prior cases, and this court is of the opinion that the Wallace case should be followed.

From the record before this court it appears administrative procedures are now being pursued by the respective parties. There has been no exhaustion of administrative remedies, and it would appear to this court that the Postmaster General should, in following administrative procedure as outlined by Congress, have a reasonable time after the proceedings have been initiated to determine whether there has [52] been a violation. There is no evidence be-

fore the court to show the proceedings are not being pursued promptly; and in the usual course the Post Office Department will make a determination whether or not the articles in question come within the statute. If the determination is adverse, plaintiff may appeal therefrom and, eventually, may present the entire matter to the District Court. That is not now before us. The only question before this court is whether, after initiating proceedings, the Postmaster General has a right to impound mail until there has been a final determination of the matter.

The question of exhaustion of administrative remedies has been discussed at length by the Ninth Circuit in Home Loan Bank Board v. Mallonee, 196 F.2d 336. At page 380, the Court lays down the rule:

> "* * * no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In the case at bar, plaintiff points out that if the court does not restrain the Postmaster from impounding her mail, she is virtually out of business and will be caused irreparable injury.

In the Home Loan Bank Board case, supra, great emphasis was laid on the injury to the association which would result if it was necessary to proceed with the administrative remedy; and at page 381 the Court said:

> "The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pursuing [53] them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention."

When it was determined that administrative remedies had not been exhausted, the Circuit Court criticized the trial court for not immediately dismissing the action. The Court said, at page 382:

> "The trial court erred when it failed to immediately dismiss * * * on the ground that * * * available administrative remedies were not first exhausted. Failure of the court to dismiss these actions * * * merely compounded the original error of the court in entertaining them at the outset of the litigation * * *, and at this point we strongly emphasize that at that time prompt and final disposition of the conservatorship issue by securing through the administrative process a final and judicially reviewable order or determination on the issue of the validity of the conservatorship, would have then laid that issue at rest thereby disposing of the one great controversy which inspired the Mallonee-Association bracket of this litigation."

In the case at bar it appears from the evidence before the court that there are administrative remedies available to plaintiff; that plaintiff is now pursuing her administrative remedies, and that such administrative remedies have not been exhausted. As a

consequence, this court does not have jurisdiction of the matter at all; therefore, [54] plaintiff is not entitled to the relief asked by her complaint. When it appears, as it does here, that a court does not have jurisdiction, it is the duty of the court to immediately dismiss the action.

> "* * *, Federal Rules of Civil Procedure 12(h), 28 U.S.C.A., applies. The pertinent portion of that rule is '* * * whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. * * *' "

Zank v. Landon,
205 F.2d 615 at 616.

Plaintiff's action is dismissed.

Dated this 1st day of April, 1954.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed April 1, 1954. [55]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 1, 1954

Present: Hon. Harry C. Westover,
District Judge.

Proceedings:

This cause, after hearing on Order to Show Cause, was submitted, and the Court having duly considered

the pleadings and the law applicable, and being fully advised in the premises signs and orders filed its Memorandum and in accordance therewith Orders plaintiff's action Dismissed.

Filed Memorandum.

Mailed copies to counsel.

EDMUND L. SMITH,
Clerk;

By MARY O. SMITH,
Deputy Clerk. [56]

United States District Court for the Southern District of California, Central Division

Civil No. 16522-HW

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California; and DOE I Through DOE IV,

Defendants.

JUDGMENT OF DISMISSAL

A hearing upon plaintiff's Order to Show Cause and Motion re Preliminary Injunction having been

had on the 25th day of March, 1954, before the Honorable Harry C. Westover, Judge presiding, in the above-entitled court, plaintiff having been represented by her attorneys, Caidin, Bloomgarden & Kalman, by Stanley R. Caidin, and defendant Otto K. Olesen, individually and as Postmaster of the City of Los Angeles, having been represented by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and Richard A. Lavine, Assistants United States Attorney; affidavits having been submitted by plaintiff; and exhibit having been submitted by defendant Otto K. Olesen; and Points and Authorities having been submitted by plaintiff and by defendant Otto K. Olesen; and

It appearing to the court that under the powers given to the Postmaster [57] General by Section 255 and Section 259(a) of Title 39, United States Code, the Postmaster General may have a reasonable time, while instituting and completing proceedings, to stop the mail temporarily until the administrative hearing and proceedings are concluded, and the final administrative order is determined; and

It further appearing to the Court, from evidence submitted, that there are administrative remedies available to the plaintiff, that plaintiff is now pursuing her administrative remedies, and that such administrative remedies have not been exhausted, by reason of which this Court does not have jurisdiction of the subject matter, and plaintiff is therefore not entitled to the relief prayed for in her complaint.

Now Therefore It Is Ordered, Adjudged and Decreed that the above-entitled action be, and it is hereby dismissed for want of jurisdiction of the subject matter.

Costs taxed at $5.00.

Dated: This 12th day of April, 1954.

/s/ HARRY C. WESTOVER,
United States District Judge.

Approved as to form this 12th day of April, 1954.

CAIDIN, BLOOMGARDEN & KALMAN,

By /s/ STANLEY FLEISHMAN,
Attorneys for Plaintiff.

Presented by

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief Civil Division;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

/s/ RICHARD A. LAVINE,
Assistant U. S. Attorney.

[Endorsed]: Filed April 12, 1954.

Docketed and entered April 12, 1954. [58]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that V. E. Stanard, individualy and doing business under the firm name and style of Male Merchandise Mart, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the complaint herein made and entered in this matter by the United States District Court, Honorable Harry C. Westover, Judge presiding.

Dated: April 12, 1954.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1954. [59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 63, inclusive, contain the original Complaint; Separate Affidavits of V. E. Stanard and Stanley R. Caidin; Order to Show Cause re Preliminary Injunction; Points and Authorities in Support of Motion for Preliminary Injunction; Opposition to Motion for Preliminary Injunction; Memorandum; Judgment of Dismissal; Notice of Appeal and Designation of Record on Appeal and a

full, true and correct copy of Minutes of the Court for April 1, 1954, which, together with defendant's Exhibit A, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 18th day of May, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[ndorsed]: No. 14361. United States Court of Appeals for the Ninth Circuit. V. E. Stanard, Individually and Doing Business Under the Firm Name and Style of Male Merchandise Mart, Appellant, vs. Otto K. Olesen, Individually and as Postmaster of the City of Los Angeles, State of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 19, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14361

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California; and DOE I Through DOE IV,

Appellees.

DESIGNATION OF POINTS ON APPEAL AND DESIGNATION OF APPEAL

V. E. Stanard, the Appellant herein, hereby designates the following as the points upon which she intends to rely in the within appeal.

I.

The Postmaster General was without statutory authority, expressed or implied, to issue the impound order.

II.

The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is violative of the First Amendment as a prior restraint on communication.

III.

The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity constitutes an infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee.

IV.

The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is in violation of the Administrative Procedure Act.

V.

The impound order was a final order subject to judicial review and the trial court erred in ruling that the order was not subject to judicial review.

The appellant designates the entire record certified by the Clerk of the District Court as the record to be printed.

Dated: May 28, 1954.

Respectfully submitted,

/s/ STANLEY FLEISHMAN,
Attorney for Appellant.

Affidavit of Mailing attached.

[Endorsed]: Filed June 1, 1954.

No. 14361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

V. E. STANARD, individually and doing business under the firm name and style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, State of California; and DOE I through DOE IV,

Appellees.

APPELLANT'S OPENING BRIEF.

STANLEY FLEISHMAN,
6331 Hollywood Boulevard,
Hollywood 28, California,
Attorney for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

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No. 14361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

V. E. STANARD, individually and doing business under the firm name and style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, State of California; and DOE I through DOE IV,

Appellees.

APPELLANT'S OPENING BRIEF.

Introduction.

This appeal relates to the right of the Post Office Department to impound appellant's mail without a hearing and before there has been any final determination of illegal activity.

Statement of Jurisdiction.

The jurisdiction of the District Court is based upon the Administrative Procedure Act, 5 U. S. Code, Section 1009, and the jurisdiction of this Court is based upon 28 U. S. Code, Section 1291 and 5 U. S. Code, Section 1009.

The District Court dismissed the Complaint, holding that the Post Office had power to impound appellant's mail pending administrative hearings, and that appellant could not question the impound order itself, because she had not exhausted her administrative remedies.

Statement of the Case.

Appellant, V. E. Stanard, is engaged in the business of distributing and selling through the mail certain publications and novelties under the firm name and style of Male Merchandise Mart. She duly filed with the Los Angeles County Clerk her certificate of business and published the same in compliance with law.

On March 1, 1954, the Solicitor of the Post Office Department filed a complaint alleging on probable cause that appellant was conducting an unlawful business through the mail in violation of 18 U. S. Code, Sections 1342 and 1461, and of 39 U. S. Code, Sections 255 and 259a.

On the same day, March 1, 1954, the Deputy Postmaster General, not the Solicitor, issued an order to the Postmaster at Los Angeles, California, directing him "to refuse to deliver such mail to the parties claiming the same until their identity and the character of the business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon a date which shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order."

Ever since March 1, 1954, the Postmaster at Los Angeles, California, has refused to deliver to appellant any mail addressed to her, arriving at the Los Angeles Post

Office. On March 1, 1954, a notice was given of a hearing to be held before a hearing examiner on March 17, 1954, in the new Post Office building, Washington, D. C. On the designated date, the appellant appeared by counsel before the Examiner in Washington, D. C., and at that time there was presented to the Hearing Officer certain advertisements which had been sent through the mail by appellant by which she solicited orders for certain books and novelties. None of the articles offered for sale were presented to the Examiner and no evidence was received that any of such articles had been transported through the mail.

On March 19, 1954, appellant filed an action seeking judicial relief restraining and enjoining the appellee from impounding petitioner's mail. The Hon. Harry C. Westover, District Judge of the United States District Court for the Southern District of California, Central Division issued an order to show cause but refused to grant a temporary restraining order or a permanent injunction, and upon motion of appellee dismissed appellant's complaint on the ground that the court did not have jurisdiction of the matter. Judgment was entered dismissing appellant's complaint whereupon appellant filed her notice of appeal and made a motion in the United States Court of Appeals for the Ninth Circuit for relief from the impound order pending appeal. The Court of Appeals being of the opinion that the motion should not be acted upon at this time ordered "that action on the motion of Stanard be held in abeyance until 90 days from and after the said 17th day of March, 1954 to permit the Post Office Department, within this period to make and enter a final and judicially reviewable order or determination in the said

administrative proceedings above referred to and now pending in the Post Office Department.

Appellant applied to Mr. Justice Douglas for relief from the impound order, until her appeal should be heard or the matter otherwise determined. Although the Justice was of the opinion that the impound order was invalid he nevertheless denied the application stating that if he granted the relief sought the issue of the validity of the impound order would become moot. The opinion of Mr. Justice Douglas is attached to this brief as an appendix.

Statutes Involved.

The pertinent statutes are 39 U. S. Code, Section 255, and 39 U. S. Code, Section 259a. Section 255 provides as follows:

> "Identification of persons claiming mail under fictitious address. The Postmaster General may, upon evidence satisfactory to him, that any person is using any fictitious, false, or assumed name, title or address in conducting, promoting, or carrying on or assisting therein, by means of the Post Office Establishment of the United States, any business scheme or device in violation of the provisions of sections 338 and 339 of Title 18, instruct any postmaster at any post office at which said letters, cards, packets, addressed to such fictitious, false, or assumed name or address arrive to notify the party claiming or receiving such letters, cards, or packets to appear at the post office and be identified; and if the party so notified fails to appear and be identified, or if it shall satisfactorily appear that such letters, cards, or packets are addressed to a fictitious, false, or assumed name or address, such letters, postal cards, or pack-

ages shall be forwarded to the dead-letter office as fictitious matter. (Mar. 2, 1889, c. 393, §3, 25 Stat. 873.)"

Section 259a provides as follows:

"Exclusion from mails of obscene, lewd, etc, articles, matters, devices, things or substances:

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) Instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

"(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, cor-

> poration, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes. Aug. 16, 1950, c. 721, 64 Stat. 451."

The Post Office Department knows that under existing law it has no statutory authority to impound mail pending administrative hearings. On December 31, 1952, the Select Committee on Current Pornographic Materials issued a report (H. R. 2510, 82nd Cong., 2nd Sess.) which includes the testimony of Mr. Frank, the then solicitor. In the course of his testimony Mr. Frank testified as follows on page 93 of the said report:

> "But I say, and I say it honestly to you people, that we need two acts of legislation to permit the Post Office Department to stop obscene literature going through the mails, and those are the two things I mentioned exemption from Administrative Procedure Act and the impounding bill . . . Under the impounding bill, if they felt that we dealt unfairly with them they can go into their local court immediately, and the local court will go into the question of whether we have treated them fairly. So the Post Office Department cannot act arbitrarily. We are subject to the supervision of the court . . ."

A bill to exempt certain functions of the Post Office Department from the Administrative Procedure Act was introduced on January 3, 1953 (H. R. 171, 83rd Cong., 1st Sess.) and has been referred to a subcommittee of the Committee on Post Office and Civil Service.

A bill to authorize the Postmaster General to impound mail in certain cases was introduced also on January 3, 1953 (H. R. 569, 83rd Cong., 1st Sess.) and while this bill passed the House on April 8, 1954, it has not passed the Senate. H. R. 171 and H. R. 569 follow the recommendation of the majority of the Committee on Current Pornographic Materials heretofore mentioned. At page 117 of the report the committee recommended:

> "Enactment of legislation authorizing (1) the Postmaster General to impound mail *pendente lite* which is addressed to a person or concern which is obtaining or attempting to obtain remittances of money through the mails in exchange for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and (2) exemption of the Post Office Department from the provisions of the Administrative Procedure Act."

A minority report was issued wherein it was said at page 121:

> ". . . Whether the Post Office Department should be exempted from the provisions of the Administrative Procedure Act and whether the Postmaster General should be permitted to impound mail are questions of a more serious nature. The Administrative Procedure Act was designed to assure all persons aggrieved by administrative rulings a fair and comprehensive hearing; the power to impound the mails, may be fraught with objections not immediately apparent. We therefore feel that these are questions to which committees of Congress with the proper jurisdiction should address themselves through specific hearings confined to these limited proposals. We take vigorous exception however to the general

approach to the complex nature of the subject under investigation adopted by the committee." (See also H. R. Rep. No. 850, 83rd Cong., 1st Sess.; H. R. Rep. No. 2510, 82nd Cong., 2nd Sess.; H. R. Rep. No. 1874, 82nd Cong., 2nd Sess.)

Summary of Argument.

The District Court's judgment dismissing appellant's Complaint should be reversed for the following reasons:

1. The Postmaster General was without statutory authority, express or implied, to issue the impound order.

2. The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is violative of the First Amendment as a prior restraint on communication.

3. The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity constitutes an infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee.

4. The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is in violation of the Administrative Procedure Act.

5. The impound order was a final order subject to judicial review and the trial court erred in ruling that the order was not subject to judicial reiew.

ARGUMENT.

I.

The Postmaster General Was and Is Without Authority to Issue the Impound Order.

For many years now it has been settled law that the Post Office Department has no power to impound mail pending administrative hearing.

Donnell Mfg. Co. v. Wyman, 156 Fed. 415;

Myers v. Cheeseman, 174 Fed. 783.

In the *Donnell* case the court said:

> "If the Postmaster General . . . had the authority to withhold complainant's mail for six weeks of time it was by reason of some statute. And on the hearing in this court counsel for the Government was wholly unable to present such statute for consideration, and the most diligent search by the court has been with the same result. Apparently it can be said that there is no such statute and therefore no such authority exists."

II.

The Appellant's Mail Has Been Impounded for an Unreasonable Period of Time.

It is now (when this brief was dictated June 2, 1954) more than 90 days that appellant's mail has been impounded without any determination of illegal activity on the part of appellant.

In *Donnell Mfg. Co. v. Wyman,* 156 Fed. 415, the court said:

> ". . . This court can reach no other conclusion than that for six weeks of time the mail cannot be withheld."

III.

The Due Process Clause of the Fifth Amendment Forbids the Action Taken Against Appellant.

Walker, Postmaster General v. Popenoe, 149 F. 2d 511, is a case similar to the one at bar. There the Postmaster, without hearing, refused to deliver merchandise mailed by the Plaintiff until after an administrative hearing was had. Mr. Justice Arnold, speaking for the entire Court, said:

> "In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas implicit under the Fifth Amendment . . . a full hearing is the minimum protection required by due process . . ."

In answer to the argument that to require a hearing before the taking of action would cause irreparable damage to the Government, Justice Arnold said:

> "We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intentionally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail the conditions of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk

> criminal prosecution. That was the situation here. Appellees have been prevented for a long period of time from mailing a publication which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury."

In *Reilly v. Pincus,* 338 U. S. 269, plaintiff was engaged in an enterprise which the Post Office Department found, after a hearing, to be fraudulent and detrimental to public health. The Supreme Court found that the hearing was defective in that plaintiff was not given full opportunity to cross-examine. Accordingly, an injunction was issued and the plaintiff was allowed to continue his business until such time as a valid administrative order should issue. The Court emphasized the unusually harsh remedies available to the postmaster, indicating that the courts had a higher duty to see that these harsh remedies were not invoked in denial of procedural due process of law.

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, the Court struck down administrative action which was taken without notice or hearing on the grounds that it denied procedural due process of law. In that case, Mr. Justice Douglas said:

> "It is procedure that spells much of the difference between rule by law and rule by whim or caprice."

And Mr. Justice Frankfurter observed that:

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore protect fairness, and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

Even Mr. Justice Reed in dissenting, said:

> "As a standard of due process we cannot do better than to accept as a measure that no one may be deprived of the liberty or property without such reasonable notice and hearing as fairness requires."

IV.

The Administrative Procedure Act Forbids the Action Taken Against Appellant in the Instant Case.

It is now settled law that in cases such as the instant one the Post Office Department must act in accordance with the Administrative Procedure Act.

Cates v. Haderlein, 72 S. Ct. 47, reversing 189 F. 2d 369;

Door v. Donaldson, 195 F. 2d 764.

In *Universal Camera Corp. v. The National Labor Relations Board,* 340 U. S. 477, the court said:

> "The Administrative Procedure Act . . . directs that courts must now assume more responsibility for the reasonableness and fairness of agency decisions than some courts have shown in the past."

In *United States v. Morton,* 338 U. S. 632, the court said:

> "The Administrative Procedures Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise carry them to excess not contemplated in legislation creating their offices. It created safeguards narrower than the constitutional ones, against arbitrary official encroachment upon private lives."

V.

Appellant Has No Administrative Remedy and Is Entitled to Judicial Relief.

The Post Office Department has taken two actions against appellant. First the department filed a complaint signed by the solicitor claiming that appellant was engaged in an obscene business. If it is ultimately found that appellant was engaged in an obscene business the "penalty" will be the loss of the opportunity to receive mail. There is a proceeding pending on this complaint but there has not been a final determination. Second, an impound order issued by the Deputy Postmaster General which has cut off appellant's mail without hearing, and, of course without there having been an administrative order based upon evidence. To say that appellant may not attack the impound order, which is clearly a final administrative order because she is defending herself in the administrative agency in another, although related matter, is a startling proposition and at war with the Administrative Procedure Act.

A review of the Administrative Procedure Act and the House Committee Report thereon is decisive on this point. 5 United States Code, Section 1009 provides for judicial review of agency action. In explaining this section, the House Committee Report on the Administrative Procedure Act (see national document number 248, 79 Cong., 2nd Sess., 1946) states:

> "This section requires adequate, fair, effective, complete and just determination of the rights of any person in properly invoked proceedings."

Commenting on 5 United States Code, Section 1009a, the House Report says:

> "This section confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."

Commenting on 5 United States Code, Section 1009c, the House Report states:

> "Final action includes any effective or operative agency action for which there is no other adequate remedy in court. Action which is automatically stayable on further proceedings invoked by a party is not final . . . If there is . . . review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter. This section permits an agency also to require by rule that, if any party is not satisfied with the initial decision of a subordinate hearing officer, the party must first appeal to the agency (the decision meanwhile being inoperative) before resorting to the courts. In no case may appeal to 'superior authority' be required by rule unless the administrative decision is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative process after administrative action has become, and while it remains, effective."

5 United States Code, Section 1001g, defines administrative action. Commenting on this provision, the House Report states:

> "The term 'agency' brings together previously defined terms in order to simplify the language of the judicial-review provisions of Section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction."

5 United States Code, Section 1008, limits agency sanctions and powers. Commenting on this provision, the House Report states:

> "This section embraces both substantive and procedural requirements of law. It means that agencies may not undertake anything which statutes . . . do not authorize them to do."

5 United States Code, Section 1009e, sets forth the scope of court review. Commenting on this section, the House Report states:

> "Courts are required to determine the application or threatened application or questions respecting the validity or terms of any agency action notwithstanding the form of the proceeding . . . 'Accordance with law' requires among other things a judicial determination of the authority or propriety of interpretative rules and statements of policy . . . 'without observance of procedure required by law' means not only the proceedings required and procedural rights conferred by this bill but any other proceeding or procedural rights the law may require."

VI.

The Agency Action Is in Violation of the First Amendment.

We are treated here to the spectacle of a Government official declaring that certain matter is obscene without ever having seen the material. *Hannegan v. Esquire, Inc.*, 327 U. S. 146, is instructive on this aspect of the case. The court there said:

> "An examination of the items makes plain we think that the controversy is not whether the magazine publishes 'information of a public character' or is devoted to 'literature' or to the 'arts.' It is whether the contents are 'good' or 'bad.' To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our tradition that a purpose to grant it should not be easily conferred."

The Court discussing second class mailing privileges, said at pages 157-158:

> ". . . Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

See also:

Parmalee v. United States, 133 F. 2d 129.

In 28 *Virginia Law Rev.* 635, there is a note entitled "The Postal Power and Its Limitations on Freedom of the Press." At page 646 there is quoted part of a letter from Mr. Justice Holmes to Sir Frederick Pollock which reads as follows:

> "The Postmaster Generals stops letters and circulars that he (*i. e.,* generally, I suppose, some understaffer) decides to be fraudulent etc., etc. The Constitution 1st Amendment forbids any law abridging the freedom of speech and I can't believe that the stoppage is lawful. I think, in fact, that it has been an instrument of tyranny and used to stop communications that would seem alright to a different mode of thought."

It cannot be emphasized too strongly that there is no evidence that appellant was mailing or attempting to mail obscene material. As Judge Westover observed in his opinion "none of the articles offered for sale were presented to the examiner." The reason why the Post Office Department did not present the articles to the examiner in the course of the Administrative Hearing on the solicitor's complaint is suggested by the testimony of Inspector Simon before the House Committee heretofore referred to where the following transpired at page 95:

> "Mr. Burton: Is there any other typical case that you think would be of interest to the committee? You have described your operation so very clearly here—
>
> Mr. Simon: Well, we have cases where they give the impression that they, from the literature you

get the impression that they, are selling obscene matter, but when the material is received it turns out to be innocuous, and several of these cases have resulted in the issuance of fraud orders. That type of case gives us considerable trouble, along with the border-line material.

Mr. Burton: That is the type that you call fake advertising?

Mr. Simon: Fake obscene."

In the course of the same hearing, Solicitor Frank testified as follows, on pages 94-95:

". . . sometimes you can get five people together and you can give them five pieces of mail, and ask them to mark them, and you will get five different results, because in some cases it is just one of those things that depends on your own personal ideas and your own bringing-up; it depends upon how strongly you feel about things, and there are some types of that material that you just can't get two people to agree on no matter how reasonably and how objectively they look upon it. It is just an honest difference of opinion. We experience it all the time, so we have our conferences, and we decide what is going to be the best thing to do.

Mr. Burton: Those cases are frequently called your border-line cases, are they not?

Mr. Frank: Border-line cases, that is right, and may I say there are many of them, Mr. Counsel.

Mr. Keefe: In mentioning border-line, if I may just inject here, I think that is the group that, without any doubt, gives us the most complaints, gives us the most trouble, because the real pronographic material is not specifically advertised, as we mentioned before, but the man who floods the mails with

these ads, he is dealing many times with an article that he knows is going to cause a lot of trouble, I mean trouble in deciding on it, and very difficult of a criminal prosecution, and those are the things, I think, all the way along, that we are having our great trouble with.

We have no trouble with prosecution on things that are definitely obscene, but it is this material that is this way and that way that is very, very difficult to prosecute."

Conclusion.

The impound order was and is invalid. The mail withheld under this impound order should be turned over to appellant forthwith.

Respectfully submitted,

STANLEY FLEISHMAN,

Attorney for Appellant.

APPENDIX.

Supreme Court of the United States, No. ——, October Term, 1953.

V. E. Stanard, Individually and Doing Business Under the Firm Name and Style of Male Merchandise Mart, Appellant, v. Otto K. Olesen, Individually and as Postmaster of the City of Los Angeles, State of California; and Doe I Through Doe IV, Appellees. Application to Mr. Justice Douglas for Relief From Post Office Department Impound Order Pending Appeal; or in the Alternative for an Injunction Pending Appeal. [May 22, 1954.]

Opinion of Mr. Justice Douglas.

Petitioner operates her business in Hollywood, California, under the fictitious name "Male Merchandise Mart," which has been duly recorded with the state authorities. Her business is selling and distributing through the mails "publications, 'pin-up' pictures and novelties." On March 1, 1954, the Solicitor for the Post Office Department issued a complaint against her, charging that she was carrying on, by means of the Post Office, a scheme for obtaining money for articles of an obscene character; and further charging that she was depositing in the mails information as to where such articles could be obtained, all in violation of 39 U. S. C., §§255 and 259(a), 18 U. S. C., §§1342 and 1461.

On the same day on which the complaint issued, the Deputy Postmaster General ordered the Postmaster at Los Angeles, California, to refuse to deliver mail addressed to petitioner at her business address. The order stated that a complaint of unlawful use of the mails had been filed, that a hearing would be held to establish

whether there were any violations of the applicable statutes, and that the mail addressed to petitioner should be impounded until further order. This order is now in effect. It was issued without notice or hearing.

Petitioner answered the complaint and a hearing was held in Washington, D. C., in March, 1954. At the present time, there has been no final adjudication, administrative or otherwise, that petitioner has violated any statute.

On March 19, 1954, petitioner filed an action for declaratory relief in the District Court for the Southern District of California. She alleged that the Post Office had no power to impound her mail without a hearing, that she was suffering irreparable injury, and that her constitutional rights had been violated. She sought a decree enjoining the so-called impound order, hereinafter referred to as the interim order, and any other order which might be entered by the Post Office, pursuant to the hearing. The District Court dismissed the complaint, holding that the Post Office had power to impound petitioner's mail pending the administrative determination, and that petitioner could not question the administrative proceeding itself, because she had not exhausted her administrative remedies. Petitioner appealed to the Court of Appeals for the Ninth Circuit, where the appeal is now pending. She also made a motion for relief from the interim order, pending review. The Court of Appeals heard argument on the motion and took it under submission, but then vacated the submission and ordered the motion held in abeyance until June 15, 1954, to permit the Post Office Department to make a final and judicially reviewable order. The court stated that it was of the opinion that the motion should not be acted upon at that time.

Petitioner has now applied to me as Circuit Justice for relief from the interim order, until her appeal has been heard or the matter has been otherwise determined. I have heard the parties and have examined the papers presented. No question has been raised as to the power of a Circuit Justice to grant the relief requested, and I will assume that such power exists. Cf. MR. JUSTICE REED'S opinion in Twentieth Century Airlines v. Ryan, 74 Sup. Ct. 8, 98 L. Ed. 29. See also 5 U. S. C. §1009(d). I am not asked to interfere in any way with the administrative proceeding which is now being conducted. That proceeding is authorized by 39 U. S. C. §§255 and 259(a). If the administrative decision is adverse to petitioner, the Post Office will have statutory authority to intercept all mail addressed to her and either send it to the "dead-letter" office, or return it to the senders marked "Unlawful." Petitioner may have judicial review of any order entered under those statutes in an action brought after the administrative adjudication, if not in the case which is now pending in the Court of Appeals. In the present application petitioner complains only of the interim order under which her mail is being intercepted while the administrative proceeding is being conducted. She complains that the interim order was entered without notice, without a hearing, and without any authority in law, statutory or otherwise.

The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and the Sixth Amendments

guarantee. See the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in Leach v. Carlile, 258 U. S. 138, 140, and Milwaukee Publishing Co. v. Burleson, 255 U. S. 407, 417, 436; cf. Hannegan v. Esquire, Inc., 327 U. S. 146. I mention the constitutional implications of the problem only to emphasize that the power to impound mail should not be lightly implied. Yet if this power exists, it is an implied one. For I find no statutory authority of the Post Office Department to impound mail *without a hearing and before there has been any final determination of illegal activity.*

Nearly fifty years ago a district court held that there was no such statutory power, see Donnell Mfg. Co. v. Wyman, 156 F. 415. And see Myers v. Cheeseman, 174 F. 783. It has been held that the exercise of a like power without a hearing violated the Due Process Clause of the Fifth Amendment. Walker v. Popenoe, 80 U. S. App. D. C. 129, 131, 149 F. 2d 511, 513. A manual, published by the Post Office Department in 1939, stated that there was no such power. See U. S. Post Office Department, Postal Decision, 328. A bill now pending in Congress would give such power, with certain judicial safeguards. H. R. 569, 83d Cong., 1st Sess. The history of that bill and of related legislation does not show any awareness that the power proposed already exists. See H. R. Rep. No. 850, 83rd Cong., 1st Sess.; H. R. Rep. No. 1874, 82d Cong., 2d Sess.; H. R. Rep. No. 2510, 82d Cong., 2d Sess.

The Department of Justice has presented strong policy arguments (both to the Congress and to the courts) that the power is necessary. Within the past year four district courts have accepted those arguments, including the District Court which passed on this case. For the reported

decisions, see Williams v. Petty, 4 Pike & Fischer Admin. Law 2d 203; Barel v. Fiske, 4 Pike & Fischer Admin. Law 2d 207. There is something to be said on the side of the law enforcement officials. For if an illicit business can continue while the administrative hearings are under way, those who operate on a fly-by-night basis may be able to stay one jump ahead of the law. Yet it is for Congress, not the courts, to write the law. Under the law, as presently written, every business, until found unlawful, has the right to be let alone. The Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001 *et seq.*, gives some protection to that right. The power of the Post Office Department to restrain the illegal use of the mails is subject to that Act. Cates v. Haderlein, 342 U. S. 804; Door v. Donaldson, 90 U. S. App. D. C. 188, 195 F. 2d 764. Section 9 of the Act furnishes some safeguards. It provides, "In the exercise of any power or authority—

"(a) In General.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Impounding one's mail is plainly a "sanction," for it may as effectively close down an establishment as the sheriff himself. The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office, as I have said. It carries such a grave threat, it touches so close to First, Fifth, and Sixth Amendment rights, it has such serious possibilities of abuse (unless carefully restricted) that I am reluctant to read it into the statute. I, therefore, strongly incline to the view that the interim order from which petitioner seeks relief is invalid. It seems to be a final order and there is no apparent administrative remedy.

It is clear, I think, that petitioner is entitled to judicial review of the interim order. Section 10 of the Administrative Procedure Act provides:

> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> . . . . . .
>
> "(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. . . ."

The interim order should be lifted only if it is invalid. If it is lifted, the issue of its validity will become moot, see Myers v. Cheeseman, *supra*. The case is now pending in the Court of Appeals and will be decided by that court in due course. The Department of Justice advises me that a final administrative order will be made very shortly, probably in two or three weeks. If that order should be favorable to petitioner, she would, of course, receive all her mail and the case would become moot. If the order is adverse to her, its validity can be reviewed by the Court of Appeals. I was assured on oral argument that any mail intercepted under the interim order would be impounded and kept separate from the other mail that is subject to the final administrative order, until judicial review is had, so that the separate issue of the validity of the interim order will be open on review.

There is thus no danger that the issue presented by this application will become moot, if the decision of the Post Office goes against petitioner.

Petitioner presents a strong case for interim relief. Litigation, however, often places a heavy burden on the citizen; and he must frequently suffer intermediate inconveniences or losses to win his point. Since petitioner will, in due course, get judicial review of the important question of law tendered and since the action I am asked to take runs counter to the requirements of orderly procedure, I will deny the relief asked.

Application denied.

No. 14361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

V. E. STANARD, individually and doing business under the firm name and style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLSEN, individually and as Postmaster of the City of Los Angeles, State of California; and DOE I through DOE IV,

Appellees.

APPELLEE'S OPENING BRIEF.

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Appellees.

APPELLEE'S OPENING BRIEF.

Introduction.

This appeal relates primarily to the question of whether or not an Impound Order of the Postmaster General is reviewable in the District Court before the Post Office Department has conducted an administrative hearing and made a final administrative determination thereon; and secondarily, to the question of whether or not the Postmaster General has authority to make an Impound Order prior to hearing.

Statement of Jurisdiction.

If the District Court did have jurisdiction, it had it by virtue of 5 U. S. C. A. 1009(c). That it did not have jurisdiction, however, is one of the principal bases for the District Court's decision in this case, and so will be treated at some length under the heading "Argument."

The jurisdiction of this Court is based on 28 U. S. C. A. 1291.

Statement of the Case.

The appellant, V. E. Standard, is engaged in the business of distributing and selling through the mail certain publications and novelties under the firm name of Male Merchandise Mart. The general procedure followed by the appellant is to send out illustrated advertising circulars to prospective purchasers, inviting orders for the materials advertised in the circulars.

The Post Office Department, through its inspectors, uses "test" names, which eventually become included on mailing lists which are used by mail order operators such as the appellant. It is in this fashion that the Postmaster General receives these advertising circulars, though many are sent to him by interested members of the public who have also received them.

After receiving some of the appellant's advertising circulars, the following developments have taken place in this case:

March 1, 1954— The Postmaster General examined the appellant's advertising circulars and determined that they constituted evidence satisfactory to him that the appellant was depositing or was causing to be deposited in the United States mails information as to where, how and from whom obscene, lewd, lascivious, indecent, filthy and vile articles, matter, things, devices, and substances may be obtained. As a result, the Postmaster General made an order instructing the Postmaster at Los Angeles to impound all mail addressed to the appellant pending a hearing and final administrative decision. On the same date the appellant was given notice that a hearing would be held on March 17, 1954.

March 10, 1954—The appellant's attorney went to Washington, D. C., and at his request the hearing was held on that day.

March 19, 1954—The appellant filed a Complaint in the District Court (Stanard v. Olesen, 16522-HW) wherein the appellant prayed for an Injunction and declaration of invalidity of the Impound Order. An Order to Show Cause was issued on that date to be heard March 25, 1954.

April 1, 1954— Judge Westover filed a Memorandum wherein he indicated that the Impound Order was valid, but that it could not

be reviewed in the District Court at that time, because administrative remedies would not be exhausted until there had been a final determination by the Post Office Department, and that the District Court therefore did not have jurisdiction.

April 12, 1954— Appellant filed a Notice of Appeal from Judge Westover's Memorandum and made a motion in this Court for relief from the Impound Order.

April 13, 1954— Judgment of Dismissal was entered in the District Court based on Judge Westover's Memorandum.

April 30, 1954— Initial decision of the Post Office Hearing Examiner was entered and appealed from by appellant.

May 7, 1954— This Court decided to hold appellant's motion in abeyance for ninety days from March 17, 1954 (the date of the administrative hearing) to give the Post Office Department to and including June 15, 1954, within which to make and enter a final and judicially reviewable order or determination. Thereafter appellant applied to Justice Douglas as Circuit Justice for relief from the Impound Order.

May 22, 1954— Justice Douglas denied relief on the ground that appellant must seek judicial review according to the orderly procedure which she is already following.

June 11, 1954— The Post Office Department made and entered a final and judicially reviewable order instructing the Postmaster at Los Angeles to return all of appellant's mail to the senders thereof.

June 22, 1954— Appellant filed a Complaint in the District Court (Stanard v. Olesen, No. 16866-PH) wherein appellant prayed for an Injunction and declaration of invalidity of both the Impound Order of March 1, 1954, and the Final Order of June 11, 1954. An Order to Show Cause was issued to be heard June 28, 1954.

June 28, 1954— Order to Cause continued to July 12, 1954.

July 12, 1954— Judge Hall took the case under submission.

Statutes Involved.

The pertinent statutes are: 5 U. S. C. A. 1009(a) and (c), and 39 U. S. C. A. 259(a).

5 U. S. C. A. 1009(a) and (c) provides as follows:

"Judicial Review of Agency Action.

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"Rights of Review.

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"Acts Reviewable.

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

39 U. S. C. A. 259(a) provides as follows:

"Exclusion from Mails of Obscene, Lewd, etc., Articles, Matters, Devices, Things or Substances:

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for an obscene, lewd, lascivious, indecedent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) Instruct Postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to re-

turn all such mail matter to the Postmaster at the office at which it was originally mailed, with the word 'unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such Postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and . . ."

Summary of Argument.

The District Court Judgment dismissing the appellant's complaint should be affirmed for the following reasons:

1. The District Court did not have jurisdiction to review the Impound Order because it was not a final judicially reviewable order or determination.

2. The issuance of the Final Order by the Post Office Department renders this appeal moot.

3. The Postmaster General had and has authority to issue the Impound Order.

4. The power exercised by the Postmaster General in this case does not violate the Administrative Procedure Act.

5. The power exercised by the Postmaster General in this case does not violate the Due Process Clause of the Fifth Amendment nor the First Amendment.

ARGUMENT.

I.

The District Court Did Not Have Jurisdiction to Review the Impound Order Because It Was Not a Final Judicially Reviewable Order or Determination.

The applicable portions of the Administrative Procedure Act which make administrative decisions judicially reviewable have already been set forth in full under the heading "Statutes Involved." However, it is well to repeat here the pertinent portion thereof which expressly denies jurisdiction to the District Court in this case. That portion provides as follows: "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action."

On page 13 of her Brief, appellant is apparently trying to distinguish between the Impound Order and the other administrative proceedings which have taken place before the Post Office Department in this case. It is true that the original complaint was filed by the Solicitor, whereas the Impound Order was made by the Postmaster General. Still it is difficult to see how any distinction can be made. Clearly, the Impound Order, the hearing, and the Final Order are all part and parcel of the same administrative proceeding.

The Impound Order is in no way final. It does not direct the Postmaster at Los Angeles to return the mail to the senders thereof, as might be done under 39 U. S.

C. A. 259(a). It merely directs him to hold this mail pending a final determination. It is the Final Order made at a later date, after hearing, that gives final effect to the Impound Order. The final effect can be either to deliver the mail to the appellant, or to return it to the senders.

When the mail was impounded prior to final determination, this was nothing more than a preliminary, procedural, or intermediate agency action or ruling. Its only effect was to hold the rights of the parties in *status quo*. The final determination, alone, determined who was entitled to the mail, not the Impound Order. When the Final Order was made, then and then only was there any reviewable agency action. Until that time the District Court was simply without jurisdiction.

Appellant has argued on page 14 of her brief that 5 U. S. C. A. 1009(a) confers jurisdiction on the District Court in that a person is entitled to judicial review when adversely affected in fact by agency action. As already pointed out, the Impound Order does not adversely affect the appellant in that it does not order the mail returned to the senders, but merely holds it in *status quo* pending a final determination. Whether or not any interest of the appellant will be affected is purely speculative. In *Home Loan Bank Board v. Mallonee* (C. A. 9 1952) 196 F. 2d 336, Cert. Den. 345 U. S. 952 (1953), this Court held that a litigant is not entitled to judicial relief for supposed or threatened injury until prescribed administrative remedies have been exhausted.

II.

The Issuance of the Final Order by the Post Office Department Renders This Appeal Moot.

As we have pointed out under the heading "Statement of the Case," the Post Office Department has now made a final judicially reviewable order, directing the Postmaster at Los Angeles to return all of the mail impounded since March 1, 1954, and received after June 11, 1954, the date of the Final Order. That order now supersedes the Impound Order.

A complaint has been filed in the District Court on the Final Order, and in that complaint the appellant asks the District Court to take jurisdiction of all of the mail held since March 1, 1954. It is our position that the District Court could never acquire jurisdiction until the Final Order was made, and so did not acquire jurisdiction in the action which is the subject of this appeal.

In the new case now pending in the District Court, we have taken the position that the Court there should have jurisdiction over all of the mail, but that as long as this appeal is pending, this Court has jurisdiction until it decides that it has not. We therefore take the position here that the Final Order of the Post Office Department of June 11, 1954, renders this appeal moot, since the jurisdiction over all of the mail should properly be in the District Court in the second action now pending there.

III.

The Postmaster General Had and Has Authority to Issue the Impound Order.

The Postmaster General has authority, by virtue of 39 U. S. C. A. 259(a) to withhold delivery of mail to a person whenever it appears from evidence satisfactory to him that the mails are being used by that person in connection with obscene matter, either by sending obscene matter itself through the mail or by sending information as to where, how or from whom the same may be obtained.

That the Postmaster General may withhold mail prior to the holding of a hearing, prior to the conclusion thereof, and prior to the issuance of a final type order directing the return of the mail to the senders thereof, is not set forth in the statute in so many words, but the Courts have seen fit to imply this power in order to give effect to the statute.

In *Peoples United States Bank v. Gilson* (E. D. Mo. 1905) 140 Fed. 1, the Postmaster General had issued a fraud order stopping the plaintiff's mail on the basis of reports of Postal Inspectors. The plaintiff sought an injunction on the ground that the evidence was deficient. The Court denied the injunction, pointing out that the reports of the inspectors are entitled to great weight, and said at page 7: "The reports are, of necessity, evidence on which he will act. They make the reports, and their reports, in the language of the statute, was evidence sat-

isfactory to him, the Postmaster General, that the bank was engaged in a scheme to defraud. Then, and thereupon, the Postmaster General could have issued the 'fraud order'."

Wallace v. Fanning (S. D. Cal., 1953) unreported, No. 15499-T, is squarely in point. There, the plaintiff sought to enjoin the Postmaster at Los Angeles from impounding mail prior to hearing. Judge Yankwich, who heard the case during Judge Tolin's illness, denied the injunction and stated in his conclusions of law: "That under the powers given by Section 255 and 259(a), Title 39, U. S. C., the Postmaster General had a reasonable time while instituting administrative proceedings and holding a hearing on the evidence, to impound the mail addressed to W. A. Lee at the address mentioned—"

The cases cited by Appellant in support of her position are not determinative nor binding upon this question.

In the case of *Donnell Manufacturing Company v. Wyman,* (E. D. Mo. 1907) 156 Fed. 415, the Court did not hold that no mail could be withheld pending the issuance of such order, as urged by appellant, but said, at page 417:

> "This Court does not now hold that the Postmaster General cannot make needful orders pending the hearing and in furtherance of the hearing. It may or may not be that the Postmaster General or those acting in his name for a limited time can withhold the mail of the addressees. But this Court can reach no other conclusion than that for six weeks of time the mail cannot be withheld. A reasonable time only need be given the party for such hearing, and, if the party prolongs the hearing, it may be so that the Postmaster General can make proper orders to protect the public from schemes of swindlers."

Thus, if the time interval had been a shorter one, under the facts of the *Donnell Manufacturing Company* case, the Court might very well have held that the impounding was for a reasonable period.

The case of *Meyers v. Cheesman* (C. A. 6, 1909) 174 Fed. 783, cited by appellant, is not in point. In that case the lower Court made an order turning back to the plaintiff certain mail impounded prior to the fraud order, under the authority of the *Donnell Manufacturing Company* case, cited above, and ordered the mail to be held which was received by the Postmaster subsequent to the fraud order. The Postmaster defendant obeyed the trial Court's order, turned back all of the mail to the plaintiff, sought no *supersedeas,* but appealed the validity of the first part of the trial Court's order. On appeal, the Court held that the question was moot since it could not undo that which had already been done, and that even if the order were erroneous, there is no way the Court could make the plaintiff return delivered mail to the Postmaster.

In the case at bar, the Order of the Postmaster General impounding the mail was certainly for a reasonable period. The Order which is objected to by the plaintiff was issued on March 1, 1954, at the same time that a notice of hearing was served on plaintiff, noticing the hearing for March 17, 1954.

But aside from mere citation of authority, there are cogent reasons for imposing upon the Postmaster General the duty as well as the power to impound mail prior to hearing in order to protect the public interest in keeping obscene matter out of the mails.

Congress, in granting to the Postmaster General the power to impound mail prior to administrative hearing

under 39 U. S. C. A. 259(a), and the Courts, in upholding this power, have undoubtedly had in mind the obvious necessity of doing so, because of the possibility that so-called "fly-by-night" mail order operators might evade the law effectively if they could receive their mail pending an administrative hearing and final determination thereof. Certainly, Congress and the Courts must have visualized the situation whereby a person assumes a name, such as Male Merchandise Mart, sends out circulars inviting mail orders at a given address, and then receives these orders all within a period of a few months. If the Post Office could not impound those mail orders, they would all be received and filled before the administrative proceedings could be completed. At that point, the mail order operator would be completely indifferent to whatever result may be reached at the administrative hearing. He need only resume operations with a new name and address.

IV.

The Power Exercised by the Postmaster General in This Case Does Not Violate the Administrative Procedure Act.

Appellant has not cited any portion of the Administrative Procedure Act which prohibits the action taken by the Postmaster General in this case. There is no provision in that statute which specifically prohibits this action, and so if it does, that prohibition must be implied.

5 U. S. C. A. 1004 is the section which requires a hearing and notice thereof. It does not say that the Postmaster General or any other agency may not make an *ex parte* order pending the hearing, in order to preserve the *status quo*. It merely says that there must be an

agency hearing. We do not contend that the appellant is not entitled to a hearing at some time. Clearly, she has this right, and this right was afforded to her before any order was made to return the mail to the senders.

The cases cited by appellant do not support her contention. *Universal Camera Corporation v. The National Labor Relations Board,* 340 U. S. 474 (1951), involved only the question of the scope of judicial review of administrative findings. *United States v. Morton,* 338 U. S. 632 (1950), dealt with Section 3(a) of the Act, requiring an agency to publish a statement of its rules. In holding that the Federal Trade Commission had not violated the Act in that case, however, the Court said, at pages 646 and 648, that if there is statutory authority for the agency's action, objections thereto under the Administrative Procedure Act are taken in vain. In the case at bar the government necessarily contends that 39 U. S. C. A. 259(a) is statutory authority that the Postmaster General may impound mail prior to hearing. If that is so, there can then be no objection to this procedure under the Administrative Procedure Act.

V.

The Power Exercised by the Postmaster General in This Case Does Not Violate the Due Process Clause of the Fifth Amendment nor the First Amendment.

The appellant has further argued that the Impound Order takes property from her without due process of law. Certainly, if the Impound Order were final and if the appellant were not entitled to any hearing, there would be a denial of due process. Here, however, nothing is taken. The mail is simply held in *status quo* pending the

hearing. At the conclusion thereof, the mail is disposed of according to the result of that hearing. If the mail is ultimately returned to the senders, it is not returned by reason of the Impound Order, but rather by reason of the Final Order made pursuant to a hearing at which the appellant was accorded due process.

In *Walker, Postmaster General v. Popenoe* (C. A., D. C. 1945) 149 F. 2d 511, cited by the appellant, the majority opinion sustained the District Court in granting the plaintiff's motion for summary judgment. The majority also concurred in the concurring opinion of Justice Arnold that the Postmaster General could not impound mail without a hearing. The case is distinguishable on two grounds: One is that 39 U. S. C. A. 259(a) was not involved. The Postmaster General's action in that case was based on 18 U. S. C. A. 334 (now Sec. 1461), which is the criminal statute which simply declares obscene matter non-mailable. 39 U. S. C. A. 259(a) authorizes the Postmaster General to return mail upon evidence satisfactory to him. The other distinction is that in the *Walker* case, the Postmaster General held no hearing at any time. He merely attempted to withhold mail, based on his sole determination that the matter was obscene. Certainly the Fifth Amendment requires a hearing at some stage of the proceedings. Here due process was given to the appellant ten days after the Impound Order.

In *Reilly v. Pinkus,* 338 U. S. 269 (1949), cited by appellant, the Postmaster General had made no impound order and no order to hold the mail in *status quo* pending

a new hearing was requested by the government. Thus the issue in this case was no way involved.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951), is also distinguishable from the case at bar. There the Attorney General had listed certain organizations as Communist without giving to them any opportunity for a hearing at any time. In the case here on appeal nothing was taken from the appellant until she had had full opportunity to present her case to the Postmaster General at the hearing.

The appellant has also made strong arguments for the position that this power of the Postmaster General restricts the right of free speech under the First Amendment. It is elementary that this right is not absolute. Further, beyond the usual restrictions on free speech, the right to use the mails is a privilege, which Congress may make conditional.

In *Hannegan v. Esquire, Inc.,* 327 U. S. 146 (1946), cited by appellant, the Court was concerned only with the question of whether or not Congress could delegate to the Post Office Department the power to determine the right to Second Class mailing privileges based on a determination of whether a publication was good or bad for the public in its dissemination of information as to literature, the sciences, arts, or some special industry. The Court held that this power could not be delegated because it would in effect give the Post Office Department the power of censorship of the press. However,

in so holding, the Court was careful to point out that its decision was limited to matter which was questionable as good or bad literature. At page 158 the Court said: "The validity of the Obscenity Law is recognition that the mails may not be used to satisfy all tastes, no matter how perverted."

39 U. S. C. A. 259(a) was enacted in 1950, and its constitutionality has not yet been litigated. However, 39 U. S. C. A. 259, which authorizes the Postmaster General to issue fraud orders, has been in effect since 1890. In *Donaldson v. Read Magazine,* 333 U. S. 178 (1948), the constitutionality of that statute was questioned with reference to the First, Fourth, Fifth, Sixth and Eighth Amendments. The Court said at page 190:

> "All of the foregoing statutes, and others which need not be referred to specifically, manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established. The particular statutes here attacked have been regularly enforced by the executive officers and the Courts for more than half a century. They are now part and parcel of our governmental fabric. This Court, in 1904, in the case of *Public Clearing House v. Coyne,* 194 U. S. 497, sustained the constitutional power of Congress to enact the laws. The decision rejected all the contentions now urged against the validity of the statutes in their entirety, insofar as the present contentions have any possible merit. No decision of this Court, either before or after the *Coyne* case, has questioned the power of Congress to pass these laws."

39 U. S. C. A. 259(a) now gives the Postmaster General the power to issue obscenity as well as fraud orders. In view of the fact that *Donaldson v. Read Magazine* is a recent case, and in view of the language of that opinion, it is very unlikely that the Court will reverse its position on the fraud orders. If it does maintain that position, the only possible argument is that fraud and obscenity are distinguishable. However, 18 U. S. C. A. 334 (now Sec. 1461), making the mailing of obscence matter a crime, has been in effect since 1876. It has been held constitutional. *United States v. Rebhuhn* (C. A. 2, 1940), 109 F. 2d 512, cert. den., 310 U. S. 629 (1940); *Tyomies Publishing Company v. United States,* (C. C. A. 6 1914), 211 Fed. 385.

In her discussion of the right of free speech, the appellant has also raised and emphasized the fact that the actual obscene articles were not before the Postmaster General at the hearing, but only the advertising. *United States v. Rebhuhn,* 109 F. 2d 512 (C. A. 2, 1940), is similar to the case at bar. That was a criminal case under 18 U. S. C. A. 334 (now Sec. 1461) for sending obscene matter or sending information as to how the same may be obtained through the mail. Both the advertising and the material advertised were in evidence. The Court held that although the material advertised was not obscene in itself, the statute was violated because the advertising was designed to appeal to the prurient or salaciously disposed type of person.

Conclusion.

The decision of the District Court should be sustained on both grounds:

1. The Court was without jurisdiction to review the Impound Order.

2. If the Court did have jurisdiction to review the Impound Order, the Impound Order was and is valid.

This appeal should be dismissed because the Final Order supersedes the Impound Order and renders the appeal moot.

Respectfully submitted,

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No. 14364

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADRIAN GUERRERO,

Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP CO.,

Appellee.

BRIEF FOR APPELLEE

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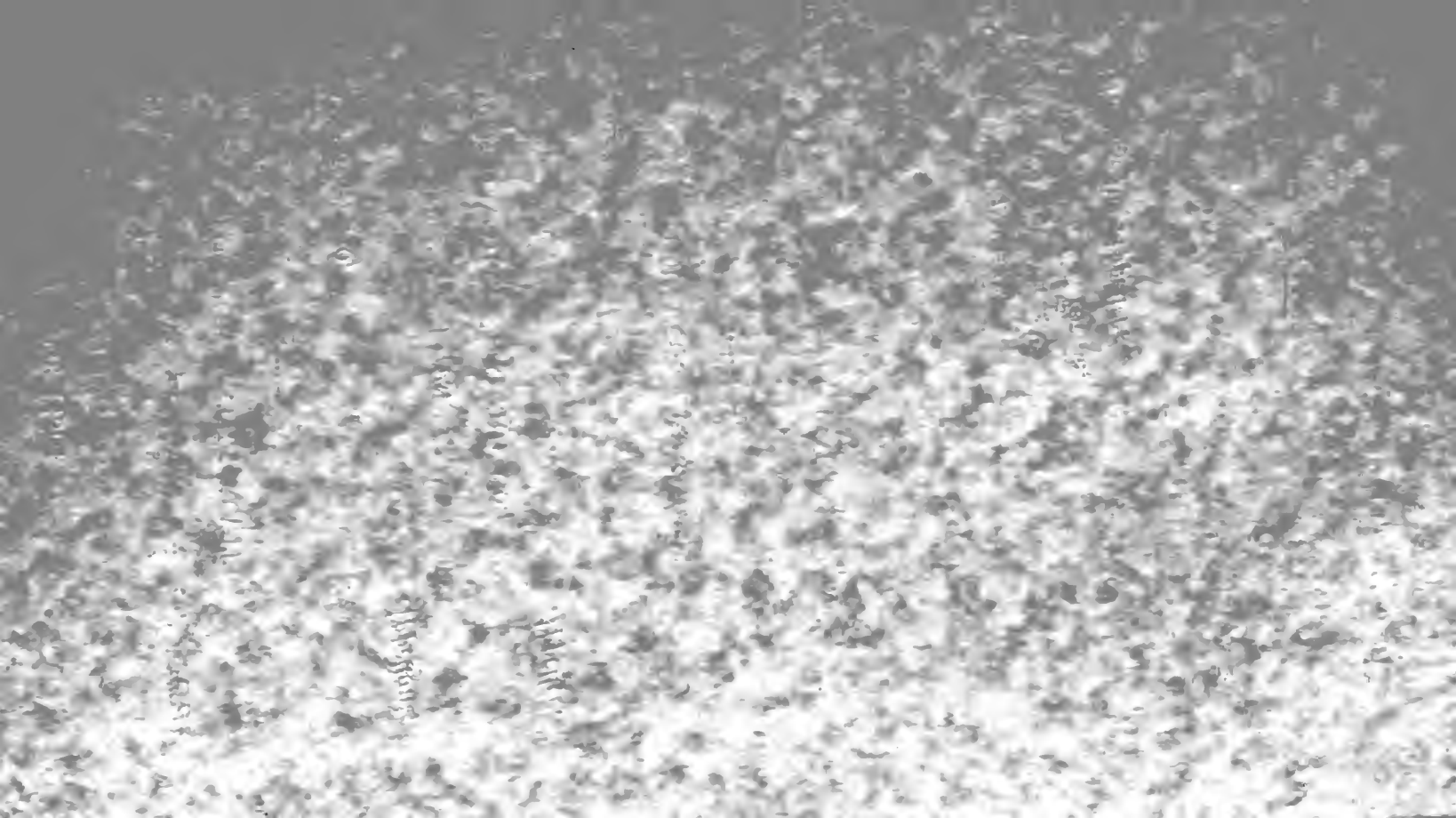

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Appellee.

BRIEF FOR APPELLEE

Jurisdictional Statement.

The Jones Act, upon which the first cause of action is predicated, provides in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (41 Stat. at Large 988, 1007; Title 46, U. S. Code, Sec. 688.)

The second cause of action is predicated upon the averment that the "plaintiff has been and will be required to spend large sums of money for his maintenance and cure."

Article III, Sections 1 and 2, Constitution of the United States, conclusively establishes the proposition that the two causes of action were within the jurisdiction of the United States District Court for the reason that said court is an inferior court which the Congress has ordained and established and the Constitution provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

The notice of appeal to this Honorable Court was filed within thirty days from the entry of the judgment. Therefore, pursuant to Rule 73, Rules of Civil Procedure, this Honorable Court is vested with jurisdiction.

Statement of the Case.

The answer of the defendant avers a separate and special defense as follows:

> "That on the 26th day of August, 1949, the plaintiff in consideration of the sum of $1812.00 duly made and executed a general release whereby he released the defendant from any and all liability for any and all claims the plaintiff might have had against the defendant including the injury for which he sues herein and the plaintiff has no proper claim therefor." [Tr. p. 7.]

On February 23, 1954, the defendant served and filed a notice of motion and a written motion for summary judgment.

The grounds of the motion are stated therein as follows:

> "That there is no genuine issue as to any material fact and that as a matter of law the defendant is entitled to judgment as a matter of law." [Tr. p. 22.]

The written motion for summary judgment also provides as follows:

> "Said motion is based upon this notice of motion and motion for summary judgment, the records and files in this action, the testimony and evidence given at the trial in said action, and upon the memorandum of points and authorities attached hereto and served and filed herewith." [Tr. p. 22.]

Also served and filed at the same time was a memorandum of points and authorities as follows:

> "There is no question but that the standard relative to releases executed by seamen is that set up by the Supreme Court in *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 248, 87 L. Ed. 239, 245:
>
> " 'We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.'
>
> "When the shipowner has once shown that the seaman executed his release with a full understanding of his rights, however, then the release will be sustained. As the Court said in *Bonici v. Standard Oil Co.,* 103 F. 2d 437:

" 'Hence, while "one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman" (Harmon v. United States, 59 F. (2d) 372 at page 373) *nevertheless a release fairly entered into and fairly safe-guarding the rights of the seaman should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty. . . . Fair settlements are in the interest of the men, as well as of the employers.*' (Emphasis added.)

"Fully in accord with this principle is the decision in *Johnson v. Andrus,* 119 F. 2d 287, at 288, where the Court stated: 'We need not consider the original validity of Johnson's claims, because we agree with Judge Hincks that whatever they were, he released them with full knowledge of what he was doing, and for an adequate consideration, satisfactory to himself . . . Scrutinize this transaction as one will, if the finding is accepted, there was not a shadow of overreaching in its procurement; *to set it aside would in effect deny to seamen the freedom to settle their controversies upon their own terms . . .*' (Emphasis added.) In the case of *Pfeil v. United States,* 34 F. 2d 923 at 924, the Court in deciding the validity of a seaman's release for salvage said: '. . . the authorities do not go to the extent of holding that seamen are incompetent to make a binding settlement, or that releases must be upset without any evidence of deception, duress, or misunderstanding, if the court thinks more might have been obtained by litigation.'

"A Jones Act case involving a release was *Wilson v. McCormick S. S. Co.,* 38 Cal. App. (2d) 726 where the court in reversing a lower verdict for a seaman and upholding the validity of the seaman's release stated, at page 735:

" 'Plaintiff's behavior and condition prior to and at the time the release was executed point unerringly to the conclusion that his physical and mental state was such that he formed in his own mind a determination to compromise his claim; that he fixed an amount for which he would settle; that he made the approach to appellant's representatives, that he negotiated with them, in which negotiations he asked for $1500 and finally compromised for $1,000 plus $250 he had theretofore received; that he signed the release and accepted the money which passed in the transaction . . . Therefore, considering the release here in question from the standpoint of the fairness of the conditions under which it was secured and of the settlement which it constituted, we find nothing unconscionable therein. The consideration which passed to the injured seaman under the terms of the settlement was not negligible or inadequate, considering the injuries sustained by him, when we remember that within a few months after the execution of the release plaintiff represented himself as an able-bodied seaman . . .'

"In the case of *Stetson v. United States,* 63 F. Supp. 24 (So. Dist. Calif.), the seaman had some $462.00 in wages due him. He had suffered some injuries and settled all of his claims, signing a release, for a total of $745.00. Judge Yankwich found that the seaman had read and understood the release and that it was executed freely, without deception or coercion and with a full understanding of his rights. Mr. Fall took an appeal from the adverse

decision but the Court of Appeals (155 F. 2d 359) affirmed the lower decree. Please see also:

Sitchon v. American Export Lines, 113 F. 2d 830;

Bandy v. Keystone Shipping Co., 100 F. Supp. 985.

"A case, the facts of which fit precisely into the case at bar, is *Harmon v. United States,* 59 F. 2d 372, where the United States Court of Appeals, in upholding a decision that the seaman's release was valid, states as follows:

" 'While the record would easily support a finding that in releasing his claim appellant did not act wisely, it does not at all appear therefrom that he was either mentally or physically incapacitated from fully understanding and appreciating what he deliberately did. On the contrary, a careful reading of the record permits no other view than that appellant thoroughly understood the contents of the instrument which he signed, was well advised of all the facts and circumstances, including the state of the medical opinion as to his case, and well knew the consequences of its signing. Here is no case of a seaman *in extremis* pressed into a half understood agreement, which takes away an undoubted right. *Here is a case of a matter in controversy, negotiations in regard to which, protracted over a considerable space of time in an atmosphere not of overreaching and double dealing, but of frankness and plain dealing, finally resulted in a settlement with nothing really set up to defeat it except the claim which of course may not avail, that one side obtained a better bargain than the other.*' (Emphasis added.)

"Therefore, if the release executed by Mr. Guerrero was executed by him freely, without deception or coercion, such release is a complete defense to this

action as a matter of law and there is no question of fact to go to the jury and defendant must prevail.

"The evidence given at the trial shows without dispute that:

"1. Plaintiff consulted Attorney Richard Gladstein in San Francisco concerning his claim.

"2. Plaintiff consulted Attorney David Marcus in Los Angeles concerning his claim.

"3. Plaintiff consulted the President of the Marine Fireman's Union, of which plaintiff was a member, with reference to his claim and the president told him how much he should ask for to settle the claim.

"4. Plaintiff consulted with Gus Oldenburg, the business agent for the same union, on various occasions concerning the claim and was in constant contact with the union and being guided by the advice of union representatives during the protracted negotiations leading up to the execution of the release.

"5. Plaintiff began his negotiations with a figure of $7500.00 which he stated he would reduce to $5000.00 if it were paid directly to him instead of through his attorney.

"6. The negotiations went on to a point where plaintiff on one occasion refused to accept $1500 plus the $312 maintenance previously paid but later returned and accepted it.

"7. There were two versions of the circumstances surrounding the items placed on the reverse side of the company's memorandum (Defendant's Exhibit at the trial), either of which substantiates the fact that plaintiff was well aware of his rights before he executed the release:

"A. Guerrero's testimony was that Mr. Oldenburg, the union business agent, had put all of the items and figures down on the memorandum and had

given the paper to Guerrero to take back to the American-Hawaiian Steamship Company's office to continue with the negotiations.

"B. The testimony of Mr. Holbrook, American-Hawaiian Steamship Company's agent, was that he had placed on this memorandum the items and amounts covering wages until the end of the voyage, lost personal effects, loss of glasses, maintenance and cure, etc. and handed the paper to Guerrero to take to his union; and that when Guerrero had returned the new items for loss of wages and 'disfiguration' had been placed on the paper.

"It is suggested that Mr. Holbrook's testimony is worthy of more weight since the face of the paper was a company office form, but in either event, there is proof positive that Guerrero knew all of his rights set out in the paper before he signed the release.

"8. Plaintiff telephoned to the San Francisco office of the American-Hawaiian Steamship Company, expressed a lack of confidence in his attorney and informed the witness Slevin that he, Guerrero, was consulting his own doctor.

"9. Plaintiff was declared 'fit for duty' by the United States Public Health Service on August 18, *194*. (1949). The release was executed by him on August 26, 1949.

"CONCLUSION

"In view of the above uncontroverted facts given in sworn testimony at the trial or set out in exhibits introduced into evidence, there can be no question but that the release is valid as a matter of law; that there is no question of fact to go to the jury; and that defendant, American-Hawaiian Steamship Company, a corporation, should have a summary judgment in its favor." [Tr. p. 22, line 25, to p. 29, line 11.]

At the same time there were also served and filed "Proposed Findings of Fact and Conclusions of Law" and a "Proposed Judgment" as follow:

"FINDINGS OF FACT.

"That on August 26, 1949, after having read the same, the plaintiff in Los Angeles County, State of California, made and executed the following contract of release:

" 'RECEIPT AND RELEASE.

" 'KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Adrian Guerrero, in consideration of the payment to him of the sum of eighteen hundred and twelve Dollars ($1,812.00) lawful money of the United States of America, the receipt whereof is hereby acknowledged, does hereby release and forever discharge American-Hawaiian Steamship Company, a corporation, the Steamship Belgium Victory, its Master, officers, agents, crew and each of them, the War Shipping Administration, United States of America, and Fireman's Fund Insurance Company, from any and all claims and demands of every nature whatsoever by the undersigned from the beginning of the world to and including the present time, and without limiting this release to any specific claim or claims, whether mentioned herein or not, the undersigned does hereby release said vessel and said parties and each of them from all claims arising out of or in connection with that certain injury and/or illness suffered by the undersigned while employed by said vessel on or about May 16, 1949, including without limitation however all claims for damages at law and in admiralty, including interest and costs, and for wages, maintenance, cure, transportation, and subsistence, under any act or law, it being the intention of this instrument to acknowledge full and

complete settlement and satisfaction for any loss, damage, injury, sickness or expense, suffered or sustained or claimed by the undersigned, as aforesaid, whether the same be now existent or known to him, or which may hereafter arise, develop or be discovered.

" 'Dated at Los Angeles this 26 day of August, 1949.

" 'THIS IS A GENERAL RELEASE.

" '*I have read and understand the above.*

" '/s/ R. F. Holbrook /s/ Adrian Guerrero.'

"II.

"That neither the plaintiff nor defendant was a minor or a person deprived of civil rights at the time the said release was executed; that each of said parties consented to the said contract of release; that there was a lawful object to such contract, that is, the settlement of plaintiff's claim against defendant; and that there was a sufficient consideration given to each of the parties for their respective consents thereto.

"III.

"Plaintiff was sent to Attorney Gladstein in San Francisco, California, by his union officials in July, 1949, relative to his injury, and plaintiff also shortly thereafter consulted Attorney Marcus in Los Angeles, California.

"IV.

"Plaintiff began negotiations for the settlement of his claim with a representative of the American-Hawaiian Steamship Company, a corporation, in

Long Beach or Wilmington, California. Plaintiff entered into negotiations with said representative and said representative started with an offer of $100.00 or $200.00 to settle plaintiff's claim. Plaintiff on his part offered to settle his claim for $7500.00 which plaintiff stated he would reduce to $5000.00 if it were paid directly to him instead of through his attorney. During the negotiations plaintiff saw Mr. Gus Oldenburg, the business agent of the union, more than once in connection with his claim and plaintiff also talked to the President of the Marine Fireman, Oilers, Watertenders and Wipers Union about his case and the money he should receive and said President told plaintiff what he should receive. During negotiations with the representative of the American-Hawaiian Steamship Company, a corporation, in Wilmington, California, in July and August, 1949, which negotiations went on for some three weeks, plaintiff was in constant contact with his union and was being guided by the advice of the union and during a part of which time plaintiff would sit and talk to the union man while the latter would talk on the telephone to someone at the company.

"V.

"The negotiations for settlement between plaintiff and defendant continued until plaintiff on one occasion refused to accept from said American-Hawaiian Steamship Company representative, R. F. Holbrook, an offer on behalf of defendant of $1500 in addition to the $312 maintenance money previously paid, but later he returned to the office of R. F. Holbrook in Wilmington, California, where he accepted the offer and executed the release and receipt.

"VI.

"That prior to executing said release and accepting the consideration therefor, plaintiff read the items and amounts set forth in Defendant's Exhibit C, to wit:

" 'Maintenance prev. paid	300.00
Maintenance due	12.00
Unearned wages	272.43
Transportation to N. O.	92.50
Bonus while workaway	25.00
Loss personal effects	47.25
Fare to S. F. and return	25.00
New Glass & Exam	70.00
	844.18
Less Tax, Etc.	38.72
Less agents advance	40.00
	765.46
Less Maintenance prev. paid	300.00
	$465.46 net

" 'Loss of wages to date—870

" 'For injuries and disfiguration—7500'

That with references to said Exhibit C, either the figures and descriptions thereon were written by said Gus Oldenburg who gave the paper to plaintiff and plaintiff read the portions of said Exhibit prepared by said Gus Oldenburg at said time and told plaintiff to give it to the company and plaintiff gave the paper to the company, or certain of the figures and descriptions, to wit:

" 'Maintenance prev. paid	300.00
Maintenance due	12.00
Unearned wages	272.43
Transportation to N. O.	92.50
Bonus while workaway	25.00
Loss personal effects	47.25
Fare to S. F. & return	25.00
New Glass & Exam	70.00
	844.18
Less Tax, Etc.	38.72
Less agents advance	40.00
	765.46
Less Maintenance prev. paid	300.00
	$465.46 net'

were written thereon by Mr. Holbrook in the presence of the plaintiff, the paper was handed to the plaintiff, and was then brought back by plaintiff to Mr. Holbrook's office and given to Mr. Holbrook with the additional items, to wit:

" 'Loss of wages to date—870

" 'For injuries and disfiguration—7500' having been placed thereon in the interim.

"VII

"With reference to Exhibit D, the receipt and release, plaintiff, immediately prior to the time he received the sum of $1500.00, placed upon said release in his own handwriting the following words and signature: 'I have read and understand the above. Adrian Guerrero.' At the time plaintiff executed said release and received the said sum

of $1500.00 he understood that he was giving up all of his claim against American-Hawaiian Steamship Company, a corporation, and said plaintiff had been a seaman for several years and knew at the time he signed said release that he was entitled to maintenance and cure for all time he was unable to work, and he also knew at said time that he was entitled to transportation back to his home or port and that defendant was obligated to pay for his return transportation; and plaintiff also knew at said time that he was entitled to his unearned wages until the end of the voyage.

"VIII.

"At the time the plaintiff executed the said release, plaintiff had had a ninth or tenth grade education.

"IX.

"Prior to executing the said release plaintiff telephoned to the San Francisco office of defendant corporation and talked to E. M. Slevin, Insurance and Claims agent for Williams, Dimond and Co., Pacific Coast Agent of American-Hawaiian Steamship Company, a corporation, and at that time informed Mr. Slevin that he, the plaintiff, lacked confidence in the attorney he then had, and further, that he was going to consult his own doctor.

"X.

"That after having been treated by the United States Public Health Service for injuries alleged to be the basis of the action at bar, plaintiff was declared fit for duty by said United States Public Health Service on August 18, 1949.

"XI.

"That plaintiff executed the said release on August 26, 1949, at Wilmington, Los Angeles County, Cali-

fornia; that he did so voluntarily; that he read and understood the contents thereof at the time he executed it; and that at no time was there any concealment, deception, misrepresentation of any fact, fraud or coercion exercised by the defendant, or by any person acting for defendant or on its behalf. That neither the defendant, nor anyone acting for it or on its behalf, at any time:

"1. Mislead the plaintiff.

"2. Suggest to plaintiff as a fact that which was not true.

"3. Assert positively to plaintiff that which was not true.

"4. Suppress from plaintiff any truthful fact.

"5. Promise plaintiff anything without having the intention to perform the promise.

"6. Do any act fitted to deceive the plaintiff.

"XII.

"That plaintiff at no time rescinded the contract of release and at no time has plaintiff restored or offered to restore to the defendant all or any part of the consideration received by plaintiff under the contract of release.

"XIII.

"At all times since the creation of the relationship of attorney and client between the plaintiff and David A. Fall, Esq., and for many years prior thereto, the said David A. Fall, has been and he now is a member of the bar of this Court and pursuant thereto authorized to practice as a proctor in admiralty and in all cases of admiralty and maritime jurisdiction and the said David A. Fall was at all times from and including the date of his employment by the plaintiff in the above entitled action thoroughly

familiar with all of the rules pertaining to the rights of a seaman under the general maritime law and pursuant to the Jones Act; and the said David A. Fall fully performed all of his duties and obligations to the plaintiff in the above entitled matter, arising out of and connected with the said relationship of attorney and client, at all times while said relationship of attorney and client has existed; and at all times herein mentioned, and from October 27, 1952, the date of plaintiff's deposition, up to and including the commencement of the trial herein and all during the trial, the said David A. Fall was aware of the fact that the plaintiff at no time rescinded or offered to rescind the release marked herein as Defendant's Exhibit D and that the said plaintiff at no time from the execution of said release up to and including the termination of the trial restored or offered to restore to the defendant the sum of $1500 or any other sum whatsoever or at all. That during the trial of this action it was pointed out to said David A. Fall in the presence of the Court by defendant's counsel that there had been no restoration or offer to restore said consideration, or any part thereof; and plaintiff has retained and still retains said consideration and all thereof.

"XIV.

"That plaintiff ratified the said contract of release by retaining the consideration received by him therefor and by not rescinding or offering to rescind said contract of release after he had available to him the professional advice of the said David A. Fall.

"XV.

"That there is no genuine issue as to any material fact set forth herein above in these Findings of Fact.

"Conclusions of Law.

"I.

"That the release of August 26, 1949, executed by the plaintiff was valid and that the plaintiff is not entitled to recover any sum whatsoever from the defendant, American-Hawaiian Steamship Company, a corporation.

"II.

"Plaintiff has by his failure to rescind or to restore or offer to restore to the defendant any part or portion of the cash consideration of $1500.00 paid to and accepted by him ratified the said release and is not entitled to attack the validity thereof in this action.

"III.

"The defendant, American-Hawaiian Steamship Company, a corporation, is entitled to judgment against the plaintiff for its costs incurred herein.

"Dated: February ....., 1954.

"United States District Judge

Approved as to form.....

Attorney for Plaintiff.

Affidavit of Mailing—Endorsed:

"Filed Feb. 23, 1954,

"Edmund L. Smith, Clerk.

"Title of District Court and Cause.

"Proposed Judgment.

"The above entitled action having come on regularly for hearing before the Honorable Harry C. Westover on motion of Defendant, American-Hawaiian Steamship Company, a corporation, for a summary judgment; Plaintiff appearing by his at-

torney, David A. Fall, Esq., and the Defendant appearing by its attorneys, Lasher B. Gallagher and Robert Sikes, by Robert Sikes, Esq., and the matter having been fully argued by counsel for the respective parties and the Court being fully advised in the law and the facts and having granted said motion; and the Court having made and filed herein its written Findings of Fact and Conclusions of Law;

"NOW, THEREFORE, IT IS HEREBY ADJUDGED AND DECREED that the Plaintiff take nothing by his action and that the Defendant, American-Hawaiian Steamship Company, a corporation, recover from the plaintiff its costs incurred herein and taxed in the sum of.....

"Dated: ....., 1954.

"UNITED STATES DISTRICT JUDGE

Approved as to form.....

Attorney for Plaintiff.

Affidavit of Mailing—Endorsed:

"Filed Feb. 23, 1954,

"EDMUND L. SMITH, Clerk"

[Tr. p. 30, line 2, to p. 40, line 25.]

The transcript shows that the proceedings at the trial which resulted in a disagreement of the jury and the declaration of a mistrial occurred on January 19 and January 21, 1954 and that the proceedings were reported by S. J. Trainor. [Tr. pp. 18-20.]

The record also shows that the proceedings on the motion for summary judgment were also reported by S. J. Trainor. [Tr. p. 42.]

On March 8, 1954 at the time of the hearing of the motion for summary judgment, the record shows as follows:

> "Statements are made respectively by the court, Attorney Sikes, and Attorney Fall."

The "Findings of Fact and Conclusions of Law" and the "Judgment" based thereon were docketed and entered on March 26, 1954, the same date upon which they were signed by the Trial Judge. These Findings of Fact and Conclusions of Law and Judgment are in the same form as set forth in the proposed Findings of Fact and Conclusions of Law and proposed Judgment.

In the appellant's designation of the portions of the record to be contained in the record on appeal, he failed to designate for inclusion any of "the testimony and evidence given at the trial in said action" specified in the written notice of motion as one of the bases of the motion or any part of the oral proceedings at the time the matter was presented to the trial judge on March 8, 1954. [Tr. p. 63.]

The only point which is involved in this appeal is whether there was a genuine issue as to any material fact concerning the validity of the release.

ARGUMENT.

POINT I.

The Fact That a Formal Issue as to the Validity of the Release Was Raised by Operation of Law Did Not Entitle the Appellant, Ipso Facto, to a Trial by Jury With Reference to That Proposition.

The Federal Rules of Civil Procedure provide, in part, as follows:

> "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." (Rule 7(d).)

This rule does not mean that the trial judge may not properly grant a motion for a summary judgment pursuant to the provisions of Rule 56.

This Honorable Court has stated the rule contended for by the appellee, in this respect, as follows:

> "The purpose of the procedural rule 56, Federal Rules of Civil Procedure, 28 U. S. C. A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings."
>
> *Koepke v. Fontecchio,* 177 F. 2d 125, 127.

POINT II.

Appellant's Contention That Section 55 of Title 45, U. S. Code, Is Applicable to a Release and Settlement Is Invalid.

At the bottom of page 25 and the top of page 26 of the brief for appellant he quotes Title 45, U. S. Code, Section 55, which provides, in part, as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: . . ."

He then states as follows:

> "The cases construing Sec. 55 of 45 U. S. C. A. are consistent in holding that a written release by an injured worker of his rights, even with consideration, does not bar a subsequent suit, . . ." (Br. for App. p. 26, lines 13-16.)

Appellant has misconceived the effect of the statute referred to.

> "The plaintiff has also contended that this release violates §5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter shall to that extent be void.' 35 Stat. 66, c. 149, 45 U. S. C. A., §55, 10A F. C. A. title 45, §55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claim without litigation."
>
> *Callen v. Pennsylvania R. Co.,* 332 U. S. 625, 630-631, 92 L. Ed. 242, 246.

POINT III.

The Appellant Has Failed to Comply With the Rules of the United States District Court, Southern District of California.

Rule 83, Federal Rules of Civil Procedure, provides as follows:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Pursuant to this authority the judges of the United States District Court for the Southern District of California have promulgated certain rules. Among these rules, in effect at the time of the proceedings on the motion for summary judgment in the case at bar, there is a specific rule with reference to motions for summary judgment. It reads as follows:

> "There shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.
>
> "Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

> "In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion." (Local Rules, So. Dist., Calif., 3(d)(2).)

The transcript demonstrates that the appellee served and filed with its motion for summary judgment "Proposed Findings of Fact and Conclusions of Law" and "Proposed Summary Judgment."

The appellant did not serve or file any "Statement of Genuine Issues." In fact, the transcript demonstrates that the plaintiff did not serve or file any document from the time appellant's motion for summary judgment and the proposed findings of fact, conclusions of law and proposed summary judgment were served and filed until after the motion had been granted.

Appellant's proposed findings stated, among others, the following material facts as to which it contended there was no genuine issue:

1. That on August 26, 1949, *after having read the same,* the plaintiff made and executed the receipt and release set forth verbatim in Paragraph I of the proposed findings of fact.
2. That each of the parties consented to the said contract of release.
3. That there was a lawful object to said contract, that is, the settlement of plaintiff's claim against defendant.

4. That there was a sufficient consideration given to each of the parties for their respective consents thereto.

5. That the plaintiff was sent to Attorney Gladstein in San Francisco, California, by his union officials, in July, 1949, relative to his injury, and also shortly thereafter consulted Attorney Marcus in Los Angeles, California.

6. That during the negotiations in July and August, 1949, leading up to the settlement, plaintiff was in constant contact with his union and was being guided by the advice of the union.

7. That immediately prior to the time the plaintiff received the sum of $1500 he placed upon the release in his own handwriting the following words and signature: "I have read and understand the above. Adrian Guerrero."

8. At the time plaintiff executed said release and received the said sum of $1500 he understood that he was giving up all of his claims against American-Hawaiian Steamship Company, a corporation, and that plaintiff knew at the time he signed said release that he was entitled to maintenance and cure for all time that he was unable to work, and that he was entitled to transportation back to his home or port and that defendant was obligated to pay for his return transportation and that he was entitled to his unearned wages until the end of the voyage.

9. That at the time the plaintiff executed the said release he had had a 9th or 10th grade education.

10. That prior to executing the said release he had been declared fit for duty by the United States Public Health Service on August 18, 1949.

11. That the plaintiff executed said release on August 26, 1949, at Wilmington, Los Angeles County, California, voluntarily.

12. That plaintiff read and understood the contents of the release at the time he signed it.

13. That at no time was there any concealment, deception, misrepresentation of any fact, fraud or coercion exercised by the defendant, or by any person acting for defendant or on its behalf.

14. That neither the defendant, nor anyone acting for it or on its behalf at any time:

    1. Mislead the plaintiff.
    2. Suggest to plaintiff as a fact that which was not true.
    3. Assert positively to plaintiff that which was not true.
    4. Suppress from plaintiff any truthful fact.
    5. Promise plaintiff anything without having the intention to perform the promise.
    6. Do any act fitted to deceive the plaintiff.

15. That plaintiff at no time rescinded the contract of release and at no time has plaintiff restored or offered to restore to the defendant all or any part of the consideration received by plaintiff under the contract of release.

16. That plaintiff ratified the said contract of release by retaining the consideration received by him therefor and by not rescinding or offering to re-

scind said contract of release after he had available to him the professional advice of said David A. Fall.

17. That there is no genuine issue to any material fact set forth hereinabove in these findings of fact.

Pursuant to the plain provisions of the Local Rules hereinabove set forth the trial judge was entitled to assume that the facts as claimed by the appellant in its proposed findings of fact were admitted to exist without controversy.

In the leading case of *Garrett v. Moore-McCormack Company,* 317 U. S. 239, 87 L. Ed. 239, the court states the rule with reference to a release executed by a seaman as follows:

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."
>
> *Garrett v. Moore-McCormack Company,* 317 U. S. 239, 248, 87 L. Ed. 239, 245.

The findings of fact show that there was no genuine issue with reference to the following facts: That the release was executed freely, without deception or coercion, and it was made by the appellant with full understanding of his rights, and that there was a sufficient consideration therefor.

The first part of Rule 3(d), Local Rules, Southern District of California, is also pertinent. The rule reads, in part, as follows:

> "There shall be served and filed with the notice of motion . . . a brief, but complete, written statement of all reasons in support thereof, together with a memorandum of the points and authorities upon which the moving party will rely. Each party opposing the motion or other application shall (A), within five days after service of the notice thereof upon him, serve and file a brief, but complete, written statement of all reasons in opposition thereto and an answering memorandum of points and authorities, or a written statement that he will not oppose said motion, . . .
>
> * * * * * * * *
>
> "Failure by the moving party to file any instruments or memorandum of points and authorities provided to be filed under this rule, shall be deemed a waiver by the moving party of the pleading or motion. In the event an adverse party fails to file the instruments and memorandum of points and authorities provided to be filed under this rule, *such failure shall be deemed to constitute a consent to* the sustaining of said pleading or *the granting of said motion* or other application." (Emphasis added.) (Local Rule, So. Dist. Calif. 3(d).)

There is nothing in the transcript of the record showing that the appellant served or filed any written statement of reasons in opposition to the motion for summary judgment or any answering memorandum of points and authorities in opposition to the motion for summary judgment.

POINT IV.

The Appellant Ratified the Contract of Release by Retaining the Consideration and Failing to Return or Offer to Return Any Part or Portion of the Consideration.

In the proposed findings of fact, served and filed with the notice of and motion for a summary judgment, the following is set forth:

> "That plaintiff ratified the said contract of release by retaining the consideration received by him therefor and by not rescinding or offering to rescind said contract of release after he had available to him the professional advice of the said David A. Fall."

The said proposed findings of fact also contained the following:

> ". . . and that at no time was there any concealment, deception, misrepresentation of any fact, fraud or coercion exercised by the defendant, or by any person acting for defendant or on its behalf. That neither the defendant, nor anyone acting for it or on its behalf, at any time:
>
> "1. Mislead the plaintiff.
>
> "2. Suggest to plaintiff as a fact that which was not true.
>
> "3. Assert positively to plaintiff that which was not true.
>
> "4. Suppress from plaintiff any truthful fact.
>
> "5. Promise plaintiff anything without having the intention to perform the promise.
>
> "6. Do any act fitted to deceive the plaintiff."

By his failure to serve and file a "Statement of Genuine Issues" setting forth any material fact with reference to the above matters as to which it was contended by

him that there existed a genuine issue necessary to be litigated, the appellant authorized the trial judge to assume that the facts as claimed by the appellee were admitted to exist without controversy.

> "When one has been induced by fraud to enter into a contract, he must ordinarily on discovery of the fraud promptly elect whether he will affirm or disaffirm the contract, and if the latter return what he received if of any value. Otherwise he will at law and in equity be held to have ratified and confirmed it. Here there was, according to Franco, no fraud in inducing him to agree to settle for his *time* for $300. He does not disaffirm, but stands by that agreement. He says there was a *fraud* in *creating* the *written memorial* of *that contract,* in inducing him to execute a paper whose *contents* were *misrepresented* to him. He can annul this paper for *that* reason without abandoning the *real* contract, and without returning the $300 *if it was really paid to settle his lost time* as he says, and not for his signature to the paper, or for a general settlement. This was a question of fact." (Emphasis added.)
>
> *Panama Agencies Co. v. Franco,* 111 F. 2d 263, 266.

The foregoing excerpt is from a case of admiralty and maritime jurisdiction. It is applicable to the question of law involved in this subdivision of the brief.

The appellant filed no "Statement of Genuine Issues" setting forth any contention that he did not fully understand the release or that the money was paid to him for something other than the consideration set forth in the written contract.

The trial judge had found that before appellant signed the release he read it, that he signed it voluntarily; and that he understood the contents thereof at the time he executed it.

The trial judge also found appellant was sent to Attorney Gladstein in San Francisco, California, by his union officials in July, 1949, relative to his injury and also shortly thereafter consulted Attorney Marcus in Los Angeles, California. In addition to this it appears without conflict that the appellant was in constant contact with the officials of his union with reference to the contemplated settlement.

By failing to file any statement of genuine issue with reference to the sufficiency of the consideration set forth as one of the material facts in the proposed findings of fact, pursuant to Local Rule 3, *supra,* the appellant admitted that there was a sufficient consideration for the release of all of his claims against the appellee.

Under the foregoing circumstances it is clear that the appellant elected to stand upon the contract. He cannot stand upon it and repudiate it at the same time.

Conclusion.

The appellant has cited no authority which entitles him, under the circumstances shown in the transcript of record, to a reversal of the judgment from which the appeal has been taken. It is respectfully contended that the judgment should be affirmed.

Respectfully submitted,

LASHER B. GALLAGHER,

Attorney for Appellee.

No. 14,364

IN THE

United States Court of Appeals

For the Ninth Circuit

ADRIAN GUERRERO,
Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
Appellee.

Appellee's Petition for Rehearing

LASHER B. GALLAGHER
111 Sutter Street
San Francisco 4, California
Attorney for Appellee-Petitioner

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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No. 14364

IN THE

United States Court of Appeals

For the Ninth Circuit

ADRIAN GUERRERO,
Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
Appellee.

Appellee's Petition for Rehearing

To: The Honorable Albert Lee Stephens, Honorable James Alger Fee, Circuit Judges, and Honorable John Wiig, United States District Judge and pro tempore, Circuit Judge:

The appellee respectfully petitions this Honorable Court for a rehearing upon the grounds and each thereof hereinafter stated immediately following the "Statement of the Pleadings and Facts in re Jurisdiction."[1]

PRELIMINARY STATEMENT

Rule 23 provides that a petition for rehearing may be presented within thirty days after judgment. Judgment was

1. Pertinent portions of all statutes and rules referred to in the body of the petition, and pertinent dictionary definitions, will be quoted in the petition *or* printed in the Appendix.

rendered on April 15, 1955. This petition is presented and filed within thirty days of said date. The rule also requires that the petition briefly and *distinctly* state its grounds, and be supported by a certificate of counsel that in his judgment it is well founded and that it is not interposed for delay.

The undersigned hereby certifies that in his judgment the petition for rehearing is well founded and that it is not interposed for delay.

The mandatory requirement of Rule 23 that a Petition for Rehearing "*distinctly* state its grounds" places counsel for the petitioning party in a difficult position.

A petition for rehearing is not and cannot be a paradoxical dissertation which in one part attempts to praise the form and substance of the judgment and in another part states a diametrically opposite contention.

The sole reason for filing a petition for rehearing is to convince the Judges who rendered the judgment complained of that they have committed serious and substantial error to the extent that a miscarriage of justice will be the result if the petition for rehearing is denied.

Consequently appellee-petitioner's counsel respectfully requests the Court to be patient and tolerant in spite of the fact that the petition will, of necessity, criticize what the Court has done, how it has done it and what it has omitted to do.

The rule promulgated by this Court requires freedom from confusion, absence of dimness, obscurity or vagueness in the admonition that the petition shall *distinctly* state its grounds. This requirement of the rule entitles counsel for the appellee-petitioner, in the performance of his duty to cause the petition to distinctly state its grounds, to assume that the Judges will read and consider it in a dis-

passionate attitude and will not be inclined to engender any resentment against the appellee-petitioner or its counsel merely because the petition follows the mandate of the rule.

STATEMENT OF THE PLEADINGS AND FACTS IN RE JURISDICTION

The first paragraph of the complaint avers that the defendant was and is a corporation organized and existing under and by virtue of the laws of the state of New Jersey. The second paragraph avers that plaintiff is a seaman and that his action for damages for personal injuries is premised upon the Jones Act, with a claim of jurisdiction predicated upon said statute. (Tr. Rec. page 2, l. 15 to p. 3, l. 1.)

That part of the Jones Act which is relevant to a case involving personal injury reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * * Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.)

The first cause of action is therefore "an action for damages at law". This Court has held that with respect to an action at law premised upon the Jones Act diversity of citizenship is not required. (*Van Camp Sea Food Co. v. Nordyke,* 140 F. 2d 902.)

A serious question of jurisdiction arises with reference to the second cause of action. This is based upon a claim for

"maintenance and cure." (Tr. Rec. p. 4, ll. 12-18.) There is no averment of diversity of citizenship between the plaintiff and the defendant.

In *Modin v. Matson Navigation Co.,* 128 F.2d 194, this Court held:

> "Thus Count 2 stated or attempted to state a claim for maintenance. * * * an action at law upon such a claim may be brought in a State court; or, if diverse citizenship exists and the claim is for more than $3,000 it may be brought in a District Court of the United States. * * * We conclude that Count 2 did not state a claim upon which the District Court, sitting as a law court, could grant relief. If the District Court could grant relief upon the claims stated or attempted to be stated in Count 2 it could do so only in admiralty."

There is nothing in the record on appeal now on file which shows that the plaintiff, at the time he commenced his action on the law side of the United States District Court, Southern District of New York was *not* a citizen of the State of New Jersey. Under these circumstances there could not have been any issue of fact submitted to a jury with reference to the second cause of action.

The jurisdiction of this Court with reference to the claim for maintenance and cure is derivative. If the United States District Court where the suit was instituted was without jurisdiction, on the law side, this Court is without appellate jurisdiction in reference to that claim.

The appeal from the judgment on the second cause of action should therefore be dismissed for lack of jurisdiction.

All of the decisions hold that it is the duty of every federal court, *sua sponte,* to question and investigate its own jurisdiction. Jurisdiction cannot be conferred by consent, silence or waiver. The second cause of action was within the jurisdiction of the United States District Court on

its *admiralty* side, but appellant would not be entitled to a trial by jury.

The opinion of this Court raises a very serious question with respect to its jurisdiction. On page 9 of the printed Opinion the Court (with reference to Rule 3(d)(2) of Rules of the United States District Court for the Southern District of California) as to summary judgments, states as follows: "The judges of the district court here concerned have acted, *assumedly* under" the authority of Rule 83, Federal Rules of Civil Procedure, which provides that each District Court may "* * * from time to time make and amend rules governing the practice not inconsistent with these rules. * * *." (Emphasis added.)

This Court must have entertained a serious doubt with reference to the power of the Judges of the United States District Court, Southern District of California, to promulgate said Rule 3(d)(2) with reference to the procedure to be followed on a motion for a summary judgment. Otherwise it would not have used the words "*assumedly* under such power". Appellee infers that this Court may be of the opinion that the provisions of the local rule with reference to findings of fact are inconsistent with the provisions of Rule 52, Rules of Civil Procedure by reason of the rule expressed in the maxim *expressio unius est exclusio alterius.*

Rule 52, F.R.C.P. provides in part as follows:

> "In all actions tried upon the *facts* without a jury or with an advisory jury, the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

If the local rule referred to, *supra,* is inconsistent with Rule 52 then local rule 3(d)(2) is void.

There can be no dispute about the proposition that a United States District Court may effectively decide a

motion for a summary judgment by an *oral* order made in open court and *entered in* the Civil Docket.

The transcript of record, pages 65-67, shows that the Clerk of the Trial Court kept a civil docket in accordance with the requirements of Rule 79 F.R.C.P. The notations with respect to the motion for summary judgment show the substance of the order.

The transcript of record, which is the only *proper* part of the record on appeal in this court shows the following: On March 8, 1954 the clerk entered an order granting the motion of defendant for summary judgment. (Tr. Rec. p. 67.) If findings of fact are not permitted or required, then the time to appeal commenced running on March 8, 1954. The notice of appeal was not filed until April 19, 1954. (Tr. Rec. p. 56.)

Rule 54 F.R.C.P. provides that "judgment" as used in the rules includes *any order from which an appeal lies.* There is no question about the proposition that the order orally announced by the trial court on March 8, 1954, and entered in the civil docket on that date was a "judgment" as that word is used in the Rules of Civil Procedure. It is axiomatic that there can be but one final judgment in any case.

If, in the case at bar, there are two "judgments," one consisting of a *summary* judgment rendered *forthwith* by the Trial Court from the bench and entered in the civil docket on March 8, 1954 and another in the form of findings of fact, conclusions of law and formal written judgment entered on March 26, 1954, an appeal from the second "judgment" would be ineffective to set aside the first "judgment" entered in the civil docket on March 8, 1954.

Appellant has not appealed from the "order" granting the motion for summary judgment and entered in the civil docket on March 8, 1954 because his notice of appeal, which

is jurisdictional, was not filed until April 19, 1954, more than thirty days after the *forthwith* rendition of summary judgment from the bench on March 8, 1954.

Rule 56(c) F.R.C.P. provides, in part:

> "* * * The (summary) judgment sought *shall* be rendered *forthwith* if the pleadings, depositions and admissions on file, together with the affidavits, *if any,* show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *" (Emphasis added.)

If this mandatory requirement that the summary judgment be rendered *forthwith* means that the statutory power of a trial court must be exercised by means of the entry of an order for summary judgment in the civil docket, then the instant the trial judge orally announced the order and it was entered by the Clerk in the civil docket, the Trial Court would have no jurisdiction to do anything more with reference to the rendition of a summary judgment. A final judicial act had occurred on March 8, 1954. If this is the case, the mere fact that the Trial Court directed that findings of fact, conclusions of law and *formal* written judgment be prepared would be nugatory and the time to appeal from the summary judgment thus rendered *forthwith* would commence to run from the entry of the order in the civil docket.

The rules of the United States District Court for the Southern District of California with reference to motions for summary judgment either *were* or were *not* promulgated pursuant to Rule 83, Rules of Civil Procedure. There is no opportunity to vacillate on that proposition. This court casts doubt upon the authority of the judges of the United States District Court, Southern District of California. It says: "The judges of the District Court here concerned have acted, *assumedly* under such power, by adopting Rule 3(d)(2) (of Rules of the United States District Court for the Southern

District of California) as to summary judgments, * * *." (Printed Opinion, p. 9.)

Appellee *contended* in its brief: "Pursuant to this (Rule 83, F.R.C.P.) authority the judges of the United States District Court for the Southern District of California have promulgated * * * a special rule with reference to motions for summary judgment." (Brief for Appellee, p. 22.) It is respectfully submitted that if this Court entertains the view that the judges of the United States District Court, Southern District of California, were without lawful power to promulgate said local rules, the Court should so state in concise and distinct language. This is an important element in the instant case. It is also of general importance because the rule is in constant application.

If the provisions of the "local rule" with reference to "findings of fact" are invalid for the reason that they may be deemed inconsistent with the provisions of Rule 52, Rules of Civil Procedure, on the theory that under no circumstances may a trial court make findings of fact unless it is rendering a decision with reference to genuine issues of material fact submitted to it, without a jury, then the local rule with reference to "findings of fact" would obviously be nugatory and the act of a trial court in making "findings of fact" on a motion for a summary judgment would be *functus officio*. Under such circumstances the notice of appeal filed in the instant case would be too late to confer any appellate jurisdiction upon this court.

> "* * * The clerk shall keep a book known as 'civil docket' * * *, and shall enter therein each civil action to which these rules are made applicable. * * * all * * * orders * * * shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the * * * substance of each order * * * of the court * * *. The notation of an order or

judgment shall show the date the notation is made." (Rule 79(a) Rules of Civil Procedure.)

The "Supplemental Transcript of Record" shows that on March 8, 1954 the trial court, from the bench, *ruled* as follows:

"* * *, THE *MOTION* FOR SUMMARY JUDGMENT *IS* GRANTED."

The Transcript of Record, filed May 21, 1954 in this court, shows on its face that the clerk of the court below entered a notation in the Civil Docket as follows: *"ent * * ord grntg mot of deft for summy jdgmt,* counsel for deft to prepare & submit findgs of fact, concls of law & judgmt accordingly" (Tr. Rec. p. 67.) If the trial court was without power to make "Findings of Fact" etc., its statement "now you can prepare the findings and judgment" would likewise be void. The Transcript of Record would, under such circumstances, show the order granting the motion for summary judgment and a notation of the substance thereof in the Civil Docket on March 8, 1954. The balance of the notation would be surplusage.

GROUNDS OF PETITION FOR REHEARING

The grounds of appellee's Petition for Rehearing are briefly and distinctly stated as follows:

1. Promptly after the filing of his notice of appeal, the appellant served upon appellee and filed *his* designation of the portions of the record to be contained in the record on appeal. Upon receipt and examination of the appellant's designation of the portion of the record to be contained in the record on appeal, appellee served and filed a designation of additional portions of the record consisting solely of the minutes kept by the Clerk of the Trial Court.

Appellant having intentionally restricted the portions of the record to be contained in the record on appeal to the

equivalent of a judgment roll, appellee was content to permit appellant to so proceed upon what has turned out to be an erroneous assumption that this court would not consider any matter or thing which was not a part of the record on appeal containing the portions of the record so as aforesaid specifically described in appellant's and appellee's designations. When completed in strict accordance with appellant's and appellee's designations the record on appeal was certified by the Clerk of the District Court, under his hand and the seal of the court, and was thereupon transmitted by said Clerk to the Clerk of this Court and was filed herein on May 21, 1954.

The Clerk of this Court, in accordance with Rule 17(3) distributed a copy of the said "Transcript of Record" to the undersigned as counsel of record for the appellee in this Court. With the record in this state the opening "Brief for Appellant" was filed and served on July 2, 1954. The "Brief for Appellee" was filed and served July 22, 1954. Ignoring Rule 18(4), rules of this Court, appellant served and filed "Appellant's Closing Brief" on February 7, 1955, more than six months after the receipt by appellant of a copy of the "Brief for Appellee".

On February 7, *1955* a document purporting to be a reporter's transcript of oral proceedings on February 15, 1954, March 1, 1954 and March 8, 1954 was filed in the office of the Clerk of the Trial Court. On February 7, 1955, the original and three copies of said reporter's transcript of oral proceedings, without being certified by the Clerk of the District Court, were transmitted to the Clerk of this Court. The Clerk of this Court pasted on the outside covers of the original and the three copies of said reporter's transcript, which was *not* a part of the *original* records of the District Court, a different cover bearing the title of this Court; the number of the cause in this Court and thereby made the

same an *ostensibly* valid part of the record on appeal for use by this Court in its consideration of the appeal and the rendition of its judgment.

No copy of this document which the Clerk of this Court described on the face of the new cover as a "Supplemental Transcript of Record" was distributed by the Clerk of this Court to counsel of record for the appellee.

All of the foregoing, with reference to the "Supplemental Transcript of Record" took place without any action on the part of this Court, the District Court, or anybody else excepting the collaborated effort of counsel for appellant, the Chief Deputy Clerk of the Trial Court and the Clerk of this Court. Appellee did not stipulate that it be prepared or filed as a supplemental record on appeal and was not notified until the judgment was rendered and filed on April 15, 1955 that this Court intended to or would use said "Supplemental Transcript of Record" as a material basis of reversal. The action of the Court in innocently using said "Supplemental Transcript of Record" was prejudicially erroneous and in direct conflict with the due process of law clause, Fifth Amendment, Constitution of the United States.

2. A release is not a maritime contract. Therefore it is not subject to the substantive or adjective admiralty and maritime law. The validity of a release is to be determined by the substantive law of the state where it was executed. If this court has assumed as one of the bases of its judgment that the release executed by appellant is a maritime contract, such assumption is erroneous.

3. This Court has inadvertently overlooked, to the benefit of appellant and the detriment of appellee, the Act of June 19, 1934, Chapter 651, §§ 1, 2 (48 Stat. 1064), enacted by the Congress, pursuant to which the Rules of Civil Procedure were promulgated by the Supreme Court of the United States; the following Rules of Civil Procedure: Rule 1; Rule 2; Rule 6(d); Rule 7(b)(1); Rule 9(g); Rule 12

(b)(6); Rule 12(c); Rule 16(1), (2), (3), (6); Rule 17(b), (c); Rule 26(a), (d)(2), (e); Rule 28(a); Rule 32(c)(1), (d); Rule 43(a), (e); Rule 46; Rule 56(b); Rule 60(a), (b)(1); Rule 61; Rule 75(a), (d), (g), (h), (i), (o); and the following Rules of the United States Court of Appeals, for the Ninth Circuit: Rule 17(3); Rule 18(2)(c); the first two sentences in Rule 18(d); and the prior decisions of this and other United States Courts of Appeal which have established clear precedent amounting to *stare decisis* with respect to the absolute requirement that the rules be obeyed by all appellants; and the proposition that a United States Court of Appeals will not consider, as ground for reversal, any claim of error unless it affirmatively appears on the face of the record, was preserved by proper objection in the trial court, and is set forth in "a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged" and that "when the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found", *and* also the provision of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of his property without due process of law.

4. The term "Burden of proof" is incontrovertibly inapplicable to a motion for a summary judgment pursuant to Rule 56 Rules of Civil Procedure. There cannot be any issue of fact involved in any part of such motion; and therefore the term "burden of proof" is not involved in the slightest degree. The only issue involved in a motion for a summary judgment is an issue of law. Upon the trial of an issue of law the use of the term "burden of *proof*" is conclusively inaccurate. The issue of law involved in a

proceeding pursuant to which a motion for a summary judgment is presented in writing and orally to a trial court, pursuant to Rule 56, Rules of Civil Procedure, is whether there is a genuine issue of material fact relevant to an issue formally raised by the pleadings and which will control the ultimate right of either the plaintiff or the defendant to prevail.

The judgment rendered by this court on April 15, 1955 shows on its face that said judgment is premised upon an erroneous conception of the basic principles and purposes of the summary judgment procedural (or adjective) and substantive law. No burden of *proof* was imposed upon the appellee to show the validity of the release in a proceeding pursuant to Rule 56. It is paradoxical to say that if the "evidence" submitted to a trial court shows that there is a genuine issue of material fact relevant to a controlling factor in the case, the motion for a summary judgment must be denied; and in the next sentence to say that in order to prevail upon such a motion the moving party must prove conclusively, by the introduction of affirmative evidence for that purpose, the non-existence of every conceivable material fact which might entitle the adverse party to submit the case to a jury for decision.

Formal issues raised by the pleadings are disregarded excepting for the single purpose of ascertaining what issues of material fact are raised thereby. The trial court determines this proposition, as a matter of law and not of fact; and the moving party and the opposing party are then *required* to cooperate completely, honestly and in good faith with the Trial Court to the end that all relevant and competent evidence of which either of the parties has any knowledge is fully disclosed for the purpose of enabling the trial court to determine, as a matter of law, from an inspection and examination of all of such evidence, oral or docu-

mentary, contradictory or corroborative, whether there is or is not a genuine issue of material fact relevant to any *controlling* issue raised by the pleadings.

5. The judgment of this court is in conflict with plainly applicable decisions of the United States Supreme Court, decisions of this Court, decisions of United States Courts of Appeal in other circuits; the Federal Rules of Civil Procedure; the Rules on Appeal promulgated by this Court; and the due process of law clause of the Fifth Amendment, Constitution of the United States.

6. The court-created presumptions and the court-created "burden of proof" rule premised thereon, as enunciated by the United States Supreme Court, United States Courts of Appeal, and United States District Courts over the course of many years last past with reference to a contract of release made and executed by and between a person whose occupational status is that of "seaman" and another person who happened, at the time of the accrual of a claim for damages for personal injuries sustained by such "seaman" to be the employer of such seaman, are and each thereof is arbitrarily discriminatory for the reason that there is no rational connection between the mere fact that any man makes his living as a seaman and the presumptions, which, collectively considered, result in the classification of all such "seamen" in a fictitious category of persons who by reason of old age, disease, weakness of mind, or other cause, are unable, unassisted, properly to manage and take care of themselves or their property, and by reason thereof are likely to be deceived or imposed upon by artful or designing persons and the classification of all employers and ex-employers of men who make their living as seamen in a category of artful or designing persons.

These court-made presumptions and the "burden of proof" rule premised thereon are and each thereof is in direct conflict with the due process of law clause, Fifth

Amendment, Constitution of the United States. Said court-created presumptions, so an inspection of the various decisions creating or recognizing them will reveal, are the result of *obiter dictum*. There is no concept of judicial notice which will support them.

With particular reference to the various decisions of courts of appellate jurisdiction where this fallacy has been created or accepted, the Courts inadvertently overlooked the fundamental proposition that they are not trial Courts and are not permitted to make findings of fact with reference to the capacity or incapacity of any party involved in an action. All an appellate Court is lawfully authorized to do is to rule whether the evidence upon which a finding of competency or incompetency has been made is legally sufficient to sustain the finding of a trial Court or jury in the face of a contention on appeal that the evidence is insufficient, as a matter of law, to sustain such finding. Whether or not any seaman is legally competent to execute a presumptively valid contract of release is not a question of law. It is a simple question of fact.

7. As a premise for this ground appellee assumes that this Court in the statements which it made in the Opinion, made them with the intention that they stated rules of law directly applicable to the parties to this particular action and the questions of law involved on this appeal. The Court states: "No one disputes the premise that seamen are under the *protection* of the Courts, * * *". Therefore the Court, at the outset of the Opinion, placed itself in the status of preserving, defending, sheltering and looking out for the security of the appellant. "Protection" means the preservation and defense of persons *non sui juris* and persons of mental incapacity. (73 C.J.S. 263.) The word "protect" carries the idea of preserving safety and making absolutely

safe and is defined as meaning to guard, shield, preserve; to preserve in safety; to preserve intact, to keep safe, take care of, to cover or shield from danger, harm, damage, trespass, exposure, insult, temptation or the like, or from that which would injure, destroy or detrimentally affect, to cover, shield, or defend from injury, harm, or damage of any kind; to defend. (73 C.J.S. 262.)

If this court intentionally meant to say that the appellant in the case at bar is under the protection of this Court, just what is it protecting the "seaman" from? Implicit in the noun "protection" is the premise that the Court in the instant case is charged with the duty of taking affirmative steps in order to take care of, guard, shield, and preserve the seaman *against* the *appellee* as the *common adversary* of *the Court and the appellant.* In all probability the use of this language was an unfortunate inadvertence on the part of the Court. On the other hand if the language was deliberately and intentionally chosen and used it demonstrates that the constitutional, statutory and common law rights of the appellee have been ignored. One of the essential requirements of due process of law, procedural and substantive, is that the Court be absolutely impartial in all respects as between the litigants. In the standard dictionaries "defend" is referred to as a synonym of "protect".

> "Defend. In a broad sense, to protect, to secure against attack. In a narrower sense, to contest and endeavor to defeat a claim or demand against one in a Court of justice: to contest a suit. Used in the broad sense, the word presupposes or indicates a preceding attack and includes the power to maintain affirmatively the rights of a person; * * *" (26 C.J.S. 671.)

"Defend" is also defined in *Powell v. U. S.,* 60 F. Supp. 433, 439 as follows:

"To protect or shield from attack or violence; guard against threatened or offered harm; to make a stand for or uphold by force or argument; maintain against attack, encroachment or opposition; maintain; vindicate, as to defend the course of administration."

8. The Court has impliedly amended and added to the specification of errors set forth on page 6 of the opening "Brief for Appellant" under the designation of "Assignment of Errors" and the summary of argument set forth on page 7 of said brief under the designation of "Outline of Argument" without giving to the appellee the slightest warning of its intention to do so or allowing the appellee any opportunity whatever to express its contentions with reference thereto either in the form of a written brief or upon oral argument; and in spite of the fact that the record on appeal shows conclusively that said points of alleged error on the part of the Trial Court were not preserved in the Trial Court by any objection which would justify this Court in ruling that the Trial Court committed prejudicial error.

9. The Court has inadvertently overlooked substantial contentions asserted by the appellee in the written "Brief for Appellee" in support of the summary judgment rendered by the Trial Court; and appellee respectfully contends that it is entitled, as a matter of absolute right, to have all such contentions decided in favor of or against appellee in direct, concise and plain language.

10. The Trial Court held, as a matter of law, that there was no genuine issue of material fact relevant to the appellee's contention that the appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration. This Court has erroneously decided these questions and

the manner in which the Court has "disposed" of them is a denial of the procedural and substantive rights of the appellee pursuant to the due process of law clause, Fifth Amendment, Constitution of the United States.

ARGUMENT IN SUPPORT OF PETITION

Ground One

On April 27, 1954, appellant served upon the appellee and filed with the District Court, a document entitled "Praecipe", but which appellee construed as "a designation of the portion of the records, proceedings and evidence to be contained in the record on appeal", in accordance with Rule 75(a), Rules of Civil Procedure. Said document designated only the following: 1) The complaint. 2) The answer. 3) Plaintiff's demand for jury trial. 4) Notice of motion and motion for summary judgment. 5) Proposed findings of fact and conclusions of law. 6) Proposed judgment. 7) Findings of fact and conclusions of law. 8) Judgment. 9) Notice of appeal and affidavit of mailing. 10) Assignment of errors and affidavit of mailing. 11) Petition and order allowing appeal without furnishing bond or prepayment of costs and points and authorities. 12) Copy of the (civil) docket. 13) Praecipe (sic), and affidavit of mailing. (Tr. Rec. p. 63.)

Having thus been notified by the appellant that he intended to prosecute his appeal from the summary judgment upon the equivalent of what is commonly known as a "judgment roll", the appellee, being satisfied to permit the appellant to do so with the addition thereto of the minutes kept by the clerk of the Trial Court "from the filing of said action to and including the entry of summary judgment", served and filed a designation of said additional portion of the record to be included in the "Record on Appeal". Appel-

lee's designation was served and filed on May 4, 1954. (Tr. Rec. p. 64.)

The Clerk of the District Court under his hand and the seal of the Court, pursuant to Rule 75(g) Rules of Civil Procedure, transmitted to the United States Court of Appeals, 9th Circuit, "a true copy of the matter designated by the parties". This document was entitled, on the cover thereof, "TRANSCRIPT OF RECORD". It was filed in the office of the Clerk of this court on May 21, 1954. The opening "Brief of Appellant" was filed and served on July 2, 1954. The "Brief for Appellee" was filed and served July 22, 1954. In utter disregard of subdivision 4, Rule 18, United States Court of Appeals, 9th Circuit, appellant served and filed "Appellant's Closing Brief" on February 7, 1955, six months and fifteen days after the receipt of copies of the "Brief for Appellee".

On February 7, *1955,* there was filed in the office of the Clerk of the United States District Court, Southern District, at a time when said court was without jurisdiction because of the Notice of Appeal which was filed in said court on April 19, 1954, the original and copies of a document entitled on its cover as follows: "Reporter's Transcript of Proceedings".

These documents were entitled on their covers as follows: "In the United States District Court, Southern District of California, Central Division". The original of the document and the copies, on page 12 thereof, contained a "Certificate" by S. J. Trainor, "Official Reporter". Said certificate is dated at Los Angeles, California "this 7th day of February, 1955." (See blue cover on original and copies amongst the files of this court; and page 12 of the contents within the covers thereof.) The original *blue* cover, bears the following endorsement: "Filed, Feb. 7—1955." This filing stamp

relates to the date upon which the documents were filed in the office of the Clerk of the District Court.

A Deputy Clerk of the District Court wrote a letter to Paul P. O'Brien, Esq., Clerk of this Court, on February 7, 1955, stating as follows:

> "I am enclosing herewith four copies of Reporter's Transcript of Proceedings on February 15, March 1 and 8, 1954 which I presume is intended as a supplement to the record on appeal. I am also forwarding a copy to each of counsel." (See file of *this* Court.)

On February 7, 1955 the undersigned, Lasher B. Gallagher, was the sole attorney of record for the appellee in this court. The court will notice that the document entitled "Supplemental Transcript of Record" now amongst the files of this court, is not "upon paper 8 inches by 10½ inches". The clerk of this Court did not prepare said record and did not distribute any copy of said "Supplemental Transcript of Record" to counsel for the appellee. There is no affidavit of mailing attached to the original or any of the copies of the "Reporter's Transcript of Proceedings" mailed by Mr. Hocke to Mr. O'Brien. There is no admission of the receipt of a copy thereof by counsel for the appellee attached to or endorsed upon the original or any of the copies of said "Reporter's Transcript of Proceedings". In fact there is nothing whatever amongst the records and files of this court to show that counsel of record for the appellee ever received any copy of said "Reporter's Transcript of Proceedings". In this connection the attention of the court is directed to the fact that pages 1, 5 and 7 of said "Reporter's Transcript of Proceedings", under the heading of "Appearances" referred to the fact that Robert Sikes, Esq., 1256 West First Street, Los Angeles, California, appeared as counsel for the defendant, American Hawaiian

Steamship Co. There is nothing in the record which shows that on February 7, 1955 said Robert Sikes, Esq. maintained an office at 1256 West First Street, Los Angeles, California. In fact he did not. 1256 West First Street, Los Angeles, California, was the address of the undersigned, attorney of record for the appellee in this court.

Neither the original of the document now on file in the office of the Clerk of this Court, nor any of the copies thereof, contains the seal of the United States District Court and said document was not "certified by the clerk as a part of the record on appeal". By reason of the fact that the document was not filed in the office of the Clerk of the District Court until February 7, 1955, it is obvious that it was not and could not be considered as a part of the "original papers" on file in the office of the Clerk of the District Court. It does not contain *testimony.* Therefore it is not "a transcript of the testimony" referred to in Rule 75(o), Rules of Civil Procedure.

The original and three copies of the "Reporter's Transcript of Proceedings" were received by Paul P. O'Brien, Esq., Clerk of this Court, on February 8, 1955. He placed or caused to be placed thereon, an additional white cover, bearing the title of this Court, the title of the cause as docketed in this Court and the number assigned to the case amongst the files of this Court. Mr. O'Brien did not, however, transmit to the undersigned any copy thereof or give him any notice, either oral or in writing, of the fact that he had filed or caused this document to be filed in his office on February 8, 1955 or at any time thereafter up to and including the date when the opinion of this court was filed and a copy thereof was transmitted to the undersigned.

Said document was not prepared nor did it find its way into the files of the case in the office of the Clerk of this

Court, pursuant to the provisions of Rule 75(h), Rules of Civil Procedure, or any part or portion thereof.

Appellant at no time claimed that anything material to either party was omitted from the record on appeal "by error or accident or is misstated therein". There was no stipulation pursuant to which this "Reporter's Transcript of Proceedings" was filed. Neither the District Court nor this Court "on a proper suggestion or of its own initiative" directed that any "supplemental record" be certified and transmitted by the Clerk of the District Court.

Having restricted its argument in the "Brief for Appellee" to four points, which appellee believed were sufficient to result in an affirmance, rather than a reversal, of the judgment appealed from, but not willing to be placed in a position where it could be rightly or wrongly accused of lulling the appellant into a sense of false security, stated as follows:

> "In the appellant's designation of the portion of the record to be contained in the record on appeal, he failed to designate for inclusion any of 'the testimony and evidence given at the trial in said action' specified in the written notice of motion as one of the bases of the motion or any part of the oral proceedings at the time the matter was presented to the trial judge on March 8, 1954." (Brief for Appellee, page 19.)

The foregoing comments of appellee were delivered, *in writing,* to the appellant on *July 22, 1954,* the date the "Brief for Appellee" was filed and served.

Rule 75(h) provides that "If any *difference* arises as to whether the record truly discloses what occurred in the District Court, the *difference* shall be submitted to and settled by that court and the record made to conform to the truth." (Emphasis added.) This provision of the rule does

not relate to matter which has been *omitted* from the record on appeal by *error or accident* or is *misstated* therein.

What appellee stated in its written brief did not give rise to "any *difference* * * * as to *whether* the record truly discloses what occurred in the District Court". The comment in appellee's brief was set forth therein for the purpose of making certain that this Court's specific attention would be called to the fact that the "Transcript of Record" which constituted the "Record on Appeal" contained nothing but the equivalent of what we all know as "a judgment roll".

There is nothing whatever in the "Transcript of Record" which affirmatively shows that anything was omitted therefrom by error or accident. It contains a copy of everything called for in the appellant's "praecipe". It must be presumed that the appellant's written "Designation of the portions of the record" to be contained in the record on appeal was the result of an intention on his part to prosecute his appeal on the equivalent of "a judgment roll".

Assuming that Rule 60(b), Rules of Civil Procedure, is available and applicable in a United States Court of Appeals, the appellant made no motion for "relief".

If this court is empowered to hear and decide a motion pursuant to Rule 60(b), Rules of Civil Procedure, the burden would have been imposed upon the appellant to show that any omission from the record was the result of "mistake, inadvertence, surprise or inexcusable neglect."

If the appellant had made a motion for an order pursuant to which, if granted, the oral proceedings contained in the abortive "Supplemental Transcript of Record" would have become a valid part of the record on appeal, appellee would have requested this court, if it were inclined to grant such motion, that it do so upon terms consisting of an order requiring the appellant to also procure, to be included in

any supplemental transcript of record, a reporter's transcript of the oral proceedings on January 25, 1954; a full and complete copy of the order of the District Court directing counsel to file simultaneous briefs on the question of the release; a copy of that part of all depositions containing material testimony relevant to the validity of the release; a copy of all exhibits; and a copy of the "Transcript of the Evidence" referred to by the trial court in the so-called "Supplement Transcript of Record".

The use by this Honorable Court of the abortive "Supplemental Transcript of Record" has reacted to the definite prejudice of appellee. A court exercising exclusively appellate jurisdiction is required to base its consideration of the rights and liabilities of the respective parties upon a written record. Fundamental ideals of fairness, as well as the due process clause of the Fifth Amendment, require that each of the parties have notice of the contents of the written record which the court is authorized to use as a basis upon which to predicate its decision.

If appellee had known, before the filing of its written brief or before the oral argument, that this court intended to use and consider the document bearing the designation "Supplemental Transcript of Record", it could and would have contended as follows: The oral proceedings on February 15, 1954 were obviously conducted as part of a pretrial hearing pursuant to which the trial judge was authorized to procure a "simplification of the issues", "the possibility of obtaining admissions of fact and of documents which (would) avoid unnecessary proof" and "such other matters as may aid in the disposition of the action". (Rule 16, Rules of Civil Procedure); and that the proceedings on January 25, 1954, the subject of notations by the Clerk of the District Court in the "civil docket" (Transcript of

Record, p. 67, ll. 19-20) also related to a pretrial hearing; and if this Court intended to use and consider the oral proceedings on February 15, 1954 (which took place before the notice of motion and written motion for summary judgment were served and filed on February 23, 1954), that appellee would be entitled, as a matter of right, to an order directing and compelling the appellant to procure and cause to be filed in this court, as an additional part of the supplemental record on appeal, a reporter's transcript of the oral proceedings on January 25, 1954, together with a true and complete copy of the order made and entered by the trial court on January 25, 1954, directing counsel for the respective parties to simultaneously file briefs on the question of the validity of the release; and a copy of all briefs filed pursuant to such order. These matters might show that the appellant, in the trial court, expressly or impliedly consented to an announced intention of the trial court to use and consider its notes and recollection of the sworn testimony of the plaintiff and other witnesses; and the various depositions then on file, in determining whether there was any genuine issue of material fact relating to the validity of the release which would require the formal issues raised by the averments in the special defense of the defendant based upon the release to be submitted to a jury for decision. Appellee also could and would have argued that the conduct and affirmative statements of appellant's counsel, shown by the colloquy between appellant's counsel and the trial court, on February 15, 1954 and March 8, 1954, constituted a consent on the part of the appellant that the trial court might use and consider all of the above matters in determining whether there was or was not any genuine issue of material fact requiring the validity of the release to be submitted to a jury. Specifically, appellee would have argued that the

sole and only contention asserted by appellant's counsel when he was unambiguously informed with reference to the trial court's intended use and consideration of the above matters was that the question of the validity of the release was a question of fact for a jury. This objection meant no more than a contention that in *every* case, and therefore in the instant case, a person whose occupational status is that of seaman is entitled as a matter of absolute right, and regardless of the state of the available evidence, to have a jury arbitrarily decide the ultimate issue as to the validity of such release. Appellee could and would have argued that the appellant made no objection directed to any contention that the trial court in considering and deciding a motion for a summary judgment was restricted to the consideration of the pleadings, depositions, admissions on file, and affidavits; or that in the performance of the judicial function of determining whether there was or was not a genuine issue of material fact relevant to the validity of the release the trial court was not authorized to consider or base his ultimate ruling upon "the files and records of the case" or "a transcript of the evidence." These matters were specifically referred to by the trial court on February 15, 1954. ("Supplemental Transcript of Record", p. 3, ll. 2-3.) Appellee could and would have argued that after appellant's counsel had heard and understood the foregoing remarks of the trial court he acquiesced in the proposed procedure when he stated as follows: "I think it would *simplify* the matter to *dispose* of this *particular* item, and then if it is decided that it is a defense, why, we have saved the time of another two days' trial." ("Supplemental Transcript of Record", p. 4, ll. 10-13). The oral proceedings on February 15, 1954 terminated as follows:

"The Court: I think that is the way to dispose of it. I will continue the question of setting until March 1. By that time you can file your motion?

Mr. Sikes: Yes, your Honor.

The Court: All right." ("Supplemental Transcript of Record", p. 4, ll. 14-18.)

Appellee could have and would have argued that nobody, including seamen who happen to be litigants, can by their chosen counsel impliedly invite a trial court to do something in a particular way and complain about it, *after* it has been done in *that* manner without the slightest objection in the trial court, when the trial court has decided the issue of law against him.

If prior to the submission of the case for decision by this Court, the appellee had been given the slightest clue that the Court *intended* to do so, it also could and would have argued that it is not within the constitutional or statutory prerogatives of this court to set forth in its opinion objections which the appellant did not urge in the trial court or to amend (*nunc pro tunc*), the specifications of error contained in the appellant's opening brief or to supply additional specifications of error which the appellant had not thought of, did not argue, and which the appellee has had no opportunity whatever to answer. This, appellee could have argued, is a clear and indefensible deprivation of due process of law both from procedural and substantive standpoints.

Ground Two

The release was executed on August 26, 1949 in Los Angeles County, State of California. (Tr. Rec. p. 30, l. 15 to p. 31, l. 22.) It is conceded that an action to recover damages under the Jones Act or the General Maritime Law or to

recover wages or money expended for maintenance and care are clearly within the admiralty and maritime jurisdiction. The reason for this is that the torts involved are maritime, the wages due pursuant to shipping articles or oral contracts of employment are predicated upon maritime contracts; and the right to maintenance and cure arises out of the contractual relationship of employer and employee in matters directly connected with the ownership, maintenance and operation of a vessel upon navigable waters.

> "Though the maritime law regulates and enforces maritime contracts, it does not take cognizance of agreements, which, although they may be preliminary to maritime contracts and have direct reference to them are not in themselves maritime. Thus, a policy of maritime insurance is a maritime contract; but an agreement to make a particular policy has been held not to be a maritime contract; so that, if the *agreement* should be *violated* and the policy should not be made, *or, being made, should differ in important particulars from that agreed upon,* the admiralty would *not* have jurisdiction of a suit for the breach of contract, although it would entertain a suit on the policy actually made. *Nor would admiralty have jurisdiction to reform the policy, or to take cognizance of a mutual mistake.* So, too, the chartering of a ship is a maritime service and the charter party is a contract within the cognizance of the admiralty; but a mere undertaking to make a charter party, or to procure a person to make one, is not within the jurisdiction of the admiralty; it is not a maritime contract, and is not subject to the regulation of the maritime law. The usual occasions on which a court of admiralty will take jurisdiction of a non-maritime contract are when such contract is incidental to a maritime contract: if a contract is maritime in itself it carries all its incidentals with it and the latter, though non-maritime in themselves, will, unless separable, be heard and decided. But where the *principal*

> *subject-matter* of a contract belongs to the jurisdiction of *a court of common law or of equity,* the *whole* contract belongs there, and admiralty will not take jurisdiction, even though incidental matters connected with the contract might in themselves be cognizable in the admiralty. The distinction in many cases will, undoubtedly, seem shadowy; still, in a large class of cases, it will be readily perceived and its importance fully appreciated." (Benedict on Admiralty, Sixth Ed., Vol. 1, pp. 127 (§ 63)-129; emphasis added.)

A list of particular instances of maritime contracts is set forth in § 66, commencing at page 133 of the same volume of Benedict on Admiralty. A list of particular instances of non-maritime contracts is set forth in § 67, commencing at page 138 of the same volume.

In this latter list reference is made to the fact that this Court in *"The T. W. Lake" (Home Ins. Co. v. Merchants Transp. Co.),* 6 F.2d 372, held that an action for the recovery of money obtained on a maritime contract of insurance by mistake or fraud was *not* within the admiralty and maritime jurisdiction. Reference is also made to the fact that an action for *fraud or misrepresentation* in inducing the making of a charter party was held not within the admiralty and maritime jurisdiction in the case of *Gronvold v. Suryan,* 12 F. Supp. 429.

In *The T. W. Lake* (supra) this Honorable Court stated as follows:

> "Jurisdiction in admiralty in cases of contract depends upon the nature of the contract 'and is limited to contracts, claims, and services purely maritime and touching the rights and duties appertaining to commerce and navigation,' *Eclipse,* 135 U.S. 599, 608. A contract of marine insurance is a maritime contract, *Insurance Company v. Dunham,* 78 U.S. 1. But a contract to pro-

cure marine insurance is not enforcible in admiralty, *Marquardt v. French,* 53 Fed. 603. Nor is a contract by a carrier by water to procure insurance on goods received for transportation a maritime contract, *City of Clarksville,* 94 Fed. 201. In *Plummer v. Webb,* 4 Mass. 380, Judge Story said: 'In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime.' In *Williams v. Providence Washington Ins. Co.,* 56 Fed. 159, it was held that admiralty has *no jurisdiction* of an action to *reform a policy of marine insurance.* Said the court, 'The complaint is, in fact, an action for *false and fraudulent representations,* by which *the libellant was induced to accept the policy,* supposing that he was insured for the Sound, when he was not. Such an action is not upon the policy itself, but upon the negotiations leading to it.' Courts of admiralty cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, *Andrews v. Essex Fire & Marine Ins. Co.,* Fed. Cas. No. 374. In *United Transp. & L. Co. v. New York & Baltimore T. Line,* 185 Fed. 386, it was held that admiralty has no jurisdiction over non-maritime transactions following the execution of maritime contracts. This was held in reference to a counter-claim for damages on account of excessive charges paid to the libellant by the respondent under a prior contract between them, which contract was alleged to be void and fraudulent for the reason that the respondent's general manager, who made it, was also an officer of the libellant and betrayed the trust imposed in him by the respondent. Said the court, 'The matter is not maritime. The fundamental question is whether the manager of the respondent corporation, induced by his interest in the libellant corporation, betrayed his trust, and this question is not maritime in its nature.' " (Emphasis added.)

In the *Gronvold* case Judge Neterer, for whom we all have profound respect, stated:

"The charter of a vessel is a maritime service, and such contract is cognizable in admiralty. BENEDICT on *Admiralty* (5th Ed.) vol. 1, sec. 62, p. 82; sec. 65, p. 88; *Torices v. Winged Racer,* Fed. Cas. No. 14,102, 39 Hunt, Mer. Mag. 458; *Osaka Shosen Kaisha v. Pacific Export Lumber Co.,* 260 U.S. 490, 1923 A.M.C. 55; *Arlyn Nelson* (D.C.) 243 Fed. 415.

"It is also fundamental that a contract maritime in itself carries involved incidentals with it, and unless separable, nonmaritime claims will be heard with the maritime. BENEDICT on *Admiralty* (5th Ed.), vol. 1, sec. 62, p. 83; *Rosenthal v. Louisiana* (C.C.) 37 Fed. 264; *Pulaski* (D.C.) 33 Fed. 383; *Evans v. New York & P. S. S. Co.* (D.C.) 145 Fed. 841; Id. (D.C.) 163 Fed. 405; *Keyser v. Blue Star S.S. Co.* (CCA) 91 Fed. 267; *Nash v. Bohlen* (D.C.) 167 Grf. 427; *Union Fish Co. v. Erickson* (CCA) 235 Fed. 385, affirmed 248 U.S. 308; *Thomas P. Beal* (D.C.) 1924 A.M.C. 640, 295 Fed. 877; *Ada* (CCA) 250 Fed. 194.

"Torts aboard a vessel on the high seas or navigable waters are of admiralty cognizance. BENEDICT on *Admiralty* (5th Ed.), vol. 1, sec. 127, p. 196; *Plymouth,* 70 U.S. 20; *Hamburg, etc. Gye* (CCA) 207 Fed. 247, certiorari denied 231 U.S. 755; *California-Atlantic S.S. Co. v. Central Door & Lumber Co.* (CCA) 206 Fed. 5; *Keator v. Rock Plaster Mfg. Co.* (D.C.) 256 Fed. 574.

"It is, however, fundamental that the exceptions relating to the matters of inducement of the libellant must be sustained, the litigant being bound by the recitals in the charter party, all matters agreed to being presumed to have been incorporated in the written memoranda, and no warranty appearing in the charter party, no breach can be invoked. *Home Insurance Co. v. Merchants' Transportation Co.,* 1927 A.M.C. 57, 16 F.(2d) 372 (9CCA). If fraud or misrepresentation induced the libellant to enter into the agreement, or

> if statements were omitted by mistake, admiralty has no jurisdiction to correct the same or to entertain jurisdiction for breach of warranty not incorporated in the contract."
>
> *Gronvold v. Suryan,* 12 F. Supp. 429, 1936 A.M.C. 105, 107-108.

Please also see the cases discussed on pages 33, 34, 35, 36 and 37, 1953 supplement, volume 1, Benedict on Admiralty, Sixth Edition.

In the case of *Mulvaney, etc. v. Dalzell Towing Co.,* 1950 A.M.C. 1053, the personal representative of a deceased seaman commenced an action for wrongful death under the Jones Act. The tort action itself was barred because it was not filed within the time limit of three years. The libellant attempted to state a cause of action against the respondent for the breach of an alleged agreement pursuant to which the respondent promised the libellant that it would "make a fair, reasonable and equitable settlement providing the libellant would refrain from instituting a suit." Libellant alleged that she relied on the promise and representation of the respondent which the latter did not intend to keep and which it had failed to keep.

The respondent excepted to the libel upon the ground, *inter alia,* that there was a "failure to state a cause of action, in the admiralty and maritime jurisdiction of [the] court." In disposing of the exceptions the trial court ruled as follows:

> "If this is an action for breach of *contract to compromise and settle,* it is *not* within the admiralty jurisdiction. And that would be equally true if it were an action for fraud and deceit as libellant suggests in its affidavit. *James Richardson & Son v. Conners Marine Co.,* 1944 A.M.C. 444 (2CA), 141 F. (2d) 226, 228;

Netherlands American Steam Nav. Co. v. Gallagher (1922, 2CA), 282 Fed. 171, 176. Nor has there been alleged any other valid ground of federal jurisdiction on the basis of which jurisdiction may be assumed over connected but non-maritime causes of action.

* * * * * * *

"The only construction of the libel which does not cause a dismissal on the merits is that the libel intends to state a claim at law for breach of contract or for fraud and deceit and, if so, it must be dismissed because not within the admiralty jurisdiction.

"It will sufficiently dispose of this application if the first exception is sustained.

"Libel dismissed for want of jurisdiction." (Emphasis added.)

Mulvaney, etc. v. Dalzell Towing Co., 90 F. Supp. 259, 1950 A.M.C. 1053, 1054-1055.

Therefore, it is respectfully submitted that whether the release was or was not invalid is governed exclusively by the substantive law of the State of California and that the burden of proof rule established by the statutes and decisions of the appellate courts of the State of California in an action where a release is pleaded as a defense are and each thereof is clearly applicable to the determination of the validity of the California contract executed by the appellant.

Is was *assumed* by the Supreme Court in *Garrett v. Moore-McCormack* that the General Maritime Law was the substantive law applicable in determining the validity of a release and that therefore the assumed admiralty "burden of proof rule" was applicable. Applying the *actual* rule to the instant case, the contract was executed in California and is therefore a California contract. Its validity must be tested by the substantive law of the State of California and

part of that substantive law is the burden of proof rule applied pursuant to the provisions of the Code of Civil Procedure on the subject of presumptions and burden of proof. (*Garrett v. Moore-McCormack Co.,* 317 U.S. 239; 87 L. ed. 239.)

The United States Supreme Court silently assumed, but did not have presented to it as a disputed question of law, that a release executed by a seaman is a maritime contract. Therefore the doctrine *stare decisis* is not applicable and the decision is not authoritative precedent against the point asserted in this subdivision of the petition. The point is open for decision; it is an important and controlling point with reference to "burden of proof" if that subject is material and relevant to the appeal by the appellant and should be the subject of a distinct ruling.

Ground Three

On page 6 of appellant's opening brief he sets forth his "Specification of Errors" relied upon under the designation: "Assignment of Errors". They are as follows:

> "A. The District Court erred in granting a Summary Judgment in favor of the defendant.
>
> "B. The District Court erred in depriving the Plaintiff of a trial by jury to determine the following questions of fact:
>
> "1. Question of Fact of unseaworthiness;
>
> "2. If injury resulted from unseaworthiness, the amount of damages plaintiff sustained for loss of wages and general damages;
>
> "3. The amount of money to which the Plaintiff was entitled to receive for unearned wages, transportation, loss of personal effects;
>
> "4. Bonus, and wages to the date Plaintiff was alleged to have been fit for duty, *in order to deter-*

mine what amount, if any, was the consideration for a general release;

"5. The District Court erred in sustaining the release given by Plaintiff to Defendant for an *inadequate consideration without a full knowledge of his rights and economic coercion;*

"6. The District Court erred in *finding* that *a return of consideration by Plaintiff to Defendant was required before the Court could set aside the release.*" (Tr. Rec. p. 6, ll. 3-26.)

"*Formal* exceptions to rulings or orders of the court are unnecessary; *but* for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, *if* a party *has no opportunity to object to a ruling or order* at the time it is made, the absence of an objection does not thereafter prejudice him." (Rule 47, F.R.C.P., emphasis added.)

Appellee has printed in full in the Appendix attached hereto the statute enacted by the Congress pursuant to which the United States Supreme Court was vested with the power "to prescribe by general rules, for the district courts of the United States * * * the forms of * * * the motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of *any* litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. * * *." (Act of June 19, 1934, c. 651, § 1, 2 (48 Stat. 1064).) (Emphasis added.)

Thus, there is no room for a contention that a seaman who happens to be a litigant in a federal district court is not required to obey the Rules of Civil Procedure just the same as any other litigant and that, in order to present *any* claim of alleged error to a United States Court of Appeals he is required, as a condition precedent thereto, for *all* purposes for which an exception has heretofore been necessary, to make known to the court at the time of a ruling his *objection to the action of the court and his grounds therefor.* (Rule 46, F.R.C.P.)

Thus the objection stating proper grounds takes the place of the old practice which required that an exception be taken to the action or ruling of a trial court before any court of appellate jurisdiction would entertain a claim of alleged error based upon such action or ruling. This Court cannot lawfully reverse the judgment in the case at bar because of the procedure adopted by the trial court in hearing the motion for a summary judgment unless the appellant objected thereto in the trial court and stated the grounds of his objection thereto.

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not effect the substantial rights of the parties." (Rule 61, F.R.C.P.) (Emphasis added.)

If this Court had not overlooked the act of the Congress, supra, and the two foregoing Rules of Civil Procedure, ap-

pellee does not believe it would have permitted the appellant to claim error based upon a record which does not show that he made any objection upon any ground to the *procedure* adopted by the trial court or any objection upon any ground to the use and consideration by the trial court of the "Transcript of the Evidence", the exhibits on file and the remaining "records and files" in the action in the trial court; or that this Court would have considered as error the various matters and things referred to by the Court in its Opinion as the grounds upon which it reversed the judgment of the trial court and in so doing basing the reversal upon matters as to which no objection was made in the trial court and in disregard of the plain fact that they were not made the subject of specifications of error in the opening brief of appellant. Thus the failure of the Court to take cognizance of these established rules of procedural and substantive law has reacted to the extreme prejudice of the appellee.

This Court has provided in its rules relevant to briefs, that the appellant's *opening* brief *shall* contain:

> "In all cases a specification of errors relied upon which shall be numbered and set out separately and particularly each error intended to be urged. * * * In all cases when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. * * * A concise argument of the case * * * exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of record and the authorities relied upon in support of each point." (Rule 18, Subdivision 1; Subdivisions 2(d), 2(e).)

Assignment "A", "The District Court erred in granting a summary judgment in favor of the defendant" does not set out particularly or at all, the error intended to be urged. It

specifies nothing and presents nothing for review. This court so held in *United States v. Cushman,* 136 F.2d 815.

All of the assignments set forth pursuant to Assignment of Error "B" (opening "Brief for Appellant", p. 6.) are confined to a contention that the District Court erred in depriving the plaintiff of a trial by jury to determine six purported questions of fact.

None of these specifications of alleged error excepting "A", "B-4", "B-5" and "B-6" is in the *slightest* degree pertinent to the order granting the appellee's motion for a summary judgment upon the ground that there was no genuine issue of fact relevant to the *separate and special* defense premised upon the general release of appellant's claim for personal-injury damages based exclusively upon the *statutory* cause of action known as the "Jones Act" or the special and separate defense raised by the appellee's contention that in any event the appellant had ratified the contract of release.

The rest of the specifications are premised upon the utterly fallacious contention asserted by appellant in his opening brief that "the determination of liability as well as the question of the amount of damages, if any, was a prerequisite to the determination of the validity of the release." (Brief for Appellant, p. 13.) Perhaps this Court embraced this novel and unsound theory of the appellant.

It seems to appellee that, for the purposes of a motion for summary judgment, a special defense based upon a release and ratification is an implied admission to the effect that up to the time of the execution of the release the seaman was in a position to introduce enough evidence to make out a *prima facie* case of actionable negligence against the ex-employer but that the release wiped out any right to assert the cause of action in the absence of a rescission regardless of the previous status.

Therefore, it is inconceivable that the appellee, in the instant case, was required to do anything more than to convince the trial court that there were no genuine issues of *material* fact relevant to the validity of the release or the subject of ratification; and that there was no burden, in addition, to prove by a preponderance of evidence or beyond all reasonable doubt or otherwise that the seaman did not have a *prima facie* cause of action before the release was executed.

If this Court believes otherwise, appellee respectfully requests that it so state *distinctly* so that the appellee will have a *fair* opportunity to demonstrate to the Supreme Court of the United States by a petition for a writ of certiorari exactly what this Court has held in this respect in the practical consideration and application of the provisions of Rule 56, F.R.C.P., in a case involving a "seaman" as one of the parties and procure a clear-cut approval or disapproval of such holding. It is always difficult to convince the Supreme Court that it should grant such petition if the point urged merely "lurks" in the background of what a United States Court of Appeals actually said and did, and bringing it out requires the petitioner to resort to a syllogistic analysis thereof.

The specifications of error asserted by the appellant on page 6 of his opening brief are not sufficient, according to Rule 18 promulgated by this Court, to raise the only question of law which could be pertinent to an appeal from the summary judgment. All of them combined do not assert and none of them alone asserts with particularity or at all any contention that the trial court committed error in deciding that, as a matter of law, there were no genuine issues of material fact relevant to the validity of the release or the ratification of said contract by the appellant.

With reference to specifications B-1 and B-2, there is no cause of action set forth in the complaint based upon the General Maritime rule that the owner of a vessel and the vessel itself are and each thereof is liable in damages to any seaman who suffers injury as a proximate result of the unseaworthiness of the vessel or a failure on the part of the owner thereof to supply and keep in order the proper appliances appurtenant to the vessel. The first cause of action specifically avers

> "That the plaintiff is a seaman and this action is brought to recover damages for personal injuries under a Federal Statute, to wit, Section 33 of the Merchant Seamen's Act of June 5, 1920, amending Section 20 of the Seamen's Act of March 4, 1915, and jurisdiction herein is claimed by virtue of said statute." (Transcript of Record, p. 2, l. 22 to p. 3, l. 1.)

There was, therefore, no possible issue of fact, genuine, material or otherwise which could have been submitted to any jury under the unseaworthiness doctrine. An indispensable condition precedent to the maintenance of a cause of action for damages premised upon the unseaworthiness doctrine of the General Maritime Law is that the court in which the action is filed has jurisdiction of the parties and the subject matter of the suit. The United States District Court is without jurisdiction to entertain such a cause of action in the absence of diversity of citizenship. (*Modin v. Matson Navigation Co.,* 128 F.2d 194.) Therefore, it is obvious that the trial court could not have committed any error in depriving the plaintiff of a trial by jury to determine any questions of fact, assuming without conceding that any question of fact did exist, with reference to "unseaworthiness" or with reference to "the amount of damages plaintiff sustained for loss of wages and general damages" purportedly *resulting from unseaworthiness.*

The District Court could not have committed any error in depriving the plaintiff of a trial by jury to determine any question of fact with reference to the amount of money which the plaintiff was entitled to receive for "unearned wages, transportation, (or) loss of personal effects" for the simple reason that there is no averment in the complaint with reference to these matters and these elements could not by any possibility be included within or considered as elements of damage in an action premised solely and exclusively upon the Jones Act. Any cause of action which the plaintiff might have had with reference to "unearned wages, transportation, (or) loss of personal effects" could not be maintained in a United States District Court with the right to trial by jury unless a controversy in that respect "exceeds the sum or value of $3,000, exclusive of interests and costs and arises under the constitution, laws or treaties of the United States" *and* there is a diversity of citizenship.

There is no averment in the complaint to the effect that plaintiff was not paid all wages, earned or unearned, to the date he was declared fit for duty by the United States Public Health Service. With reference to Specification B(4), construing it *liberally,* said specification is a contention, raised for the first time on appeal, that there was an issue of fact with reference to the *amount* of a bonus and wages owed, as a matter of law, to the plaintiff on the date when he was declared fit for duty by the United States Public Health Service.

The trial court ruled that, as a matter of law, there was no genuine issue of material fact relevant to the proposition that "plaintiff was declared fit for duty by (the) United States Public Health Service on August 18, 1949." (Transcript of Record, p. 49, ll. 22-25.)

Said specification B(4), however, does *not* set forth a contention that any of the evidence available to either of the

parties upon this subject was in conflict or that the trial court committed any error in ruling, as a matter of law, that there was no genuine issue of material fact upon which a jury could have found that the date upon which plaintiff was actually declared fit for duty by the United States Public Health Service was *not* August 18, 1949; or the ruling of the trial court, that, as a matter of law, there was no genuine issue of material fact relevant to the proposition that the *actual* amounts of bonus and wages owing to the plaintiff by the defendant immediately before the execution of the release were, respectively, any sum in excess of $25.00 for bonus and $272.43 for unearned wages.

Said Assignment of Error B(4) does not set out particularly or at all any contention that the Trial Court erred in ruling, as a matter of law, that there was no genuine issue of material fact with respect to the propositions that the net sum owed by the defendant to the plaintiff with reference to *all* of his claims arising out of the Shipping Articles, other contracts and/or the General Maritime Law as to maintenance, was any sum in excess of $465.46 or that the amount paid as a consideration for the general release was the difference between $465.46 and $1,500.

With further reference to Assignment of Error B(4), appellant cannot present any claim of error with respect thereto because he does not, anywhere in his brief, refer to any part of the "Transcript of Record" which would support a contention that there was *any* question of fact (genuine, material or *otherwise*) relevant to the elements specified in said Assignment of Error.

Assignment of Error B(5) *assumes,* as premises, that the release was executed by plaintiff for an inadequate consideration, without a full knowledge of his rights and as a result of economic coercion. Appellant does not refer

to any part of the record on appeal which supports the foregoing assumptions or any thereof. In order to justify this Assignment of Error, unless it appears *affirmatively* on the face of the valid "TRANSCRIPT OF RECORD", filed in this Court on May 21, 1954, the appellant must point his finger to some "evidence" from which it reasonably appears that there was a genuine issue of material fact relevant to the *assumed* premises. There is nothing in the record on appeal which indicates any such "genuine issue of material fact". In any event, appellant has not referred to any page of the record on appeal where it can be found.

Assignment of Error B(6) does not set out particularly, or at all, the error, if any, intended to be urged. It specifies nothing and presents nothing for review. (*U. S. v. Cushman,* 136 F.2d 815.) Said Assignment of Error B(6) is no different than an assignment that "the trial court erred in ordering judgment" which this Court held, in *U. S. v. Cushman, supra,* to be fatally defective and insufficient to present any issue of law pursuant to which this Court could hold that the trial court committed any error whatever.

Specification B(6) is fatally defective in another respect. It is directed solely to a contention that "the District Court erred in *finding* that a return of consideration by plaintiff to defendant was required before the court could set aside the release." Rule 18(d) requires: "In *all* cases when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

So that there will be no justifiable foundation for a conclusion that the undersigned is in any wise attempting to mislead the Court with reference to this particular point addressed to the insufficiency of Specification B(6) it is pointed out that that word "finding" in the Rule, in all probability may not have been intended to cover "Findings" of

fact made by a trial court on a motion for a summary judgment. Pursuant to Rule 56, Rules of Civil Procedure, it would be more reasonable and logical to conclude that there are no "Findings of Fact", within the usual meaning of that phrase, contained in the document entitled "Findings of Fact" in the case at bar.

"Findings of Fact" are ordinarily required when the *pleadings* raise a substantial issue of fact, even though the evidence introduced in support of the averments set forth by the respective parties in their pleadings is uncontradicted. Therefore the "Findings of Fact" in the case at bar should be viewed in the same light. Each "Finding of Fact" in the case at bar was, in effect, a *ruling* by the trial court that the material facts set forth therein were the only facts or evidence disclosed and brought to the attention of the trial court for examination by the trial court in the consideration and determination of the legal issue involved in the motion.[1] Therefore appellant cannot contend in this Court that the trial court committed an error of law in his determination that there was no genuine issue of material fact with reference to any of said elements unless he points to some part of the Transcript of Record filed May 21, 1954 which will sustain his contention. The simple fact is that nowhere in his Brief does he attempt to do this.

The Manual of Federal Appellate Procedure (Third Ed.) 1941, authored by Paul P. O'Brien, Esq., sets forth a review of the decisions affecting briefs in a manner that cannot be improved upon. Appellee therefore quotes therefrom as follows:

> "The brief should follow strictly the rule providing for stating separately and particularly the errors

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1. "That there is no genuine issue as to any material fact set forth hereinabove in these Findings of Fact." (Tr. Rec. p. 52, ll. 8-9.)

asserted and intended to be urged; (Reid et al. v. Baker (CCA 9), 17 F.(2d) 770.) and where the error alleged relates to the admission or rejection of evidence, the full substance of the evidence admitted or rejected should be quoted or stated. (Weiland v. Pioneer Irr. Co. (CCA 8), 238 F. 519, 523; Winterton Gum Co. v. Autosales Gum & Chocolate Co. (CCA 6), 211 F. 612; Cullins v. Finley (CCA 9), 94 F.(2d) 935; United Cigar Whelan Stores Corp. v. U. S. (CCA 9), 113 F.(2d) 340; Waggoner v. U. S. (CCA 9), 113 F. (2d) 867.) Failure to set out the specifications of error relied upon in a brief warrants an affirmance of the judgment. (Lohman v. Stockyards Loan Co. (CCA 8), 243 F. 517; City of Goldfield, Colo. v. Roger (CCA 8), 249 F. 39.) Concerning specifications of error relied on, each specification should conform substantially, if not literally, to the particular assignment of error on which it is predicated, and for convenience there ought to be, with each specification in the brief, a reference to the corresponding assignment of error, as well as to the place in the bill of exceptions or other part of the record where the alleged error is shown, the relation of each specification to its corresponding assignment should be in some way distinctly indicated. (Vider et al. v. O'Brien (CCA 7), 62 F. 326.) Unless the brief contains a reference to the pages of the record and the authorities relied upon in support of each point, the court will deem the errors assigned not of sufficient importance to require a search for them. (City of Houston v. Southwestern Bell Tel. Co., 259 U.S. 318, 352, 42 S. Ct. 486, 66 L.Ed. 961; Lawson v. U. S. (CCA 7), 9 F.(2d) 746; Feinup v. Kleinman et al. (CCA 8), 5 F.(2d) 137; Varner et al. v. Clark (CCA 8), 283 F. 17, 19; Walton et al. v. Wild Goose Min. & Trad. Co. (CCA 9), 123 F. 209; Wallace v. Hudson-Duncan & Co. (CCA 9), 98 F.(2d) 985.) Statements in brief may be considered as admissions of fact. (Young & Vann Supply Co. v. Gulf F. & A. Ry. Co. et al. (CCA 5), 5

F.(2d) 421.) Language with respect to opposing party or counsel must be respectful, otherwise brief will be stricken from the files. (Supreme Council of the Royal Areanum v. Green, 237 U.S. 531, 35 S. Ct. 724, 59 L.Ed. 1089.) Considerable latitude is indulged in in an appeal prosecuted *in forma pauperis,* and where brief is prepared by the individual litigant, who is not a member of the bar, it will not be stricken from the files, nor will the appeal be dismissed, for a failure to strictly comply with the rule. (Edwards v. Bodkin (CCA 9), 249 F. 562.) Briefs should be filed within the time stated in the rule, but this is not jurisdictional, and a dismissal for failure to file within the time prescribed will not necessarily follow. (Matsumura v. Higgins, etc. (CCA 9), 187 F. 601; Hupper v. Hyde, etc. (CCA 5), 296 F. 862; Cardigan v. White, etc. (CCA 8), 18 F. (2d) 572.) Where appellant neither files a brief nor appears at the time the cause is called for hearing, the cause is subject to dismissal, but where the appellee has filed a brief, the court will proceed to a determination of the cause on the merits. (Plazuela Sugar Co. v. Alvarez (CCA 1), 295 F. 511; Zaluondo v. Civille (CCA 1), 295 F. 691.)

"The Court of Appeals for the Eighth Circuit refused filing of a brief for appellee because presented out of time with no proper reason for its not being filed in time. (Cardigan v. White, etc. (CCA 8), 18 F. (2d) 572.)

"The necessity for complying with the rule regarding setting out the specifications of error relied on, and that the rule in effect requires counsel to specify from the errors assigned in the court below, which are frequently numerous, those upon which they will rely for reversal, and that the rule 'will be enforced by the court, to the end that the vital issues in the case may be clearly presented', and that a failure to observe the rule is ground for affirmance is stressed in these words: 'If the rule is observed the arguments of counsel and

the consideration of the court are concentrated upon the important questions in controversy, instead of being scattered and dissipated by the argument in consideration of numerous side issues, that, if at all material, are generally governed by the decision of the main questions, and in this way a just result is more speedily and certainly attained'. (Harrow-Taylor Butter Co. v. Crooks, etc. (CCA 8), 41 F.(2d) 627; Harold Lloyd Corporation, et al. v. Witwer (CCA 9), 65 F.(2d) 1, 15; Angco et al. v. Standard Oil Co. of California (CCA 9), 66 F.(2d) 929; Coates v. U. S. (CCA 9), 59 F.(2d) 173; Steinberger et al. v. U. S. (CCA 9), 81 F.(2d) 1008; Huffman v. Baldwin et al. (CCA 8), 82 F.(2d) 5.)

"The court (CCA 9) has definitely announced that Subdivision 2(d) of Rule 18 must be strictly complied with, particularly stressing the necessity of setting out in the brief the specifications or assignments of error relied upon. (See, Gelberg, etc. v. Richardson, etc. (CCA 9), 82 F.(2d) 314; Gripton v. Richardson, etc. (CCA 9), 82 F.(2d) 313; Berry v. Earling, etc. (CCA 9), 82 F.(2d) 317; Barnett et al. v. U. S. A. (CCA 9), 82 F.(2d) 765; Hultman, etc. v. Tevis (CCA 9), 82 F. (2d) 940.)

"Purported reports not admitted in evidence included in appendix to brief cannot be considered unless introduced in evidence and included in proper record. (Zell v. Bankers' Utilities Co. Inc. (CCA 9), 77 F.(2d) 22.)

"The Appellate Court will not pass on questions suggested only in the briefs and not in any manner based on the record. (Wabash Ry. Co. v. American Refrigerator Transit Co. (CCA 8), 7 F.(2d) 335, 352.)

"Points not argued in the brief are presumed to be abandoned. (Central R. Co., etc. v. Shick (CCA 3), 38 F.(2d) 968, 972; McCarthy et al. v. Ruddock (CCA 9), 43 F.(2d) 976; Forno v. Coyle (CCA 9), 75 F.(2d) 692. See, also, Humphreys Gold Corp. v. Lewis (CCA 9), 90 F.(2d) 896.)

"A single specification urging error in the rejection of evidence and in the giving and refusing to give instructions is not in accordance with the rule as covering more than one point. Such alleged errors should be set out separately and particularly and when the error alleged is as to the charge of the court, the specification should set out the part referred to *totidem verbis,* whether it be in instructions given or instructions refused. (Burnstein et al. v. U. S. (CCA 9), 55 F.(2d) 599, 604; Coates v. U. S. (CCA 9), 59 F.(2d) 173.)

"The court is disinclined to consider a point raised for the first time in a petition for rehearing (all points relied upon should be included in the opening brief). (Bassick Mfg. Co. v. Adams Grease Gun Corp. (CCA 2), 54 F.(2d) 285.)

"Rule as to the filing of briefs is a rule of convenience and it is within the discretion of the court to permit the appellant to file copies of a brief *nunc pro tunc.* (Delaware & Hudson Co. v. Stankus (CCA 3, 63 F.(2d) 887, 888. See, also, McGrath, etc. v. Nolan et al. (CCA 9), 83 F.(2d) 746.)

"Objections and assignments of error not pressed in brief will be disregarded. (Consolidated Interstate-Callahan Min. Co. v. Witouski et al. (CCA 9), 249 F. 833; Lee Tung v. U. S. (CCA 9), 7 F.(2d) 111; E. K. Wood Lumber Co. v. Moore Mill & Lumber Co. (CCA 9), 97 F.(2d) 402, 404; Humphreys Gold Corp. v. Lewis (CCA 9), 90 F.(2d) 896; Commissioner of Internal Revenue v. O'Donnell (CCA 9), 90 F.(2d) 907; Lonergan v. U. S. (CCA 9), 88 F.(2d) 591; Moore v. Tremelling (CCA 9), 100 F.(2d) 39, 43.)

"Points not raised by objection and exception, nor referred to in assignments of error, but made in the brief on appeal for the first time will be ignored. (Bitker v. Rosenberg (CCA 7), 68 F.(2d) 196; Ford Motor Co. v. Chas. A. Myers Mfg. Co. (CCA 6), 64 F.(2d) 942.)

"Issues not specifically raised by pleadings, cannot be first raised in the assignments of error and the briefs.

(Continental Casualty Co. v. U. S. (CCA 7), 68 F.(2d) 577.)

"With respect to the necessity of complying with the rule concerning the jurisdictional statement, it is held that a failure to include such a statement if the briefs may be taken as good ground for compelling the reprinting of the offending briefs. (Credit Bureau of San Diego, Inc. et al. v. Petrasich et al. (CCA 9), 97 F.(2d) 65, 67.)"

Manual of Federal Appellate Procedure, O'Brien, (Third Ed.) 1941, pp. 209-213.

"Matters not argued, and no authorities cited to sustain suggestions of error, will be regarded as waived; (Hubshman et al. v. Louis Keer Shoe Co. Inc. (CCA 7), 129 F.(2d) 137, 142; American Ins. Co. v. Scheufler, etc. (CCA 8), 129 F.(2d) 143.)

"Where an issue (except of jurisdiction) has not been raised or considered by the trial court, but is presented for the first time, the appellate court will not examine it, particularly where the matter is one of fact and the record fails to reveal sufficient for a determination of the issues; (Goldie v. Cox (CCA 8), 130 F.(2d) 690, 715.)

"Questions argued on oral argument which the record does not disclose to have been raised in the trial court, and which are not argued in either brief will not be considered; (Hinton et al. v. Columbia River Packers Assn., Inc. (CCA 9), 131 F.(2d) 88.)

"Failure of appellant to specify point in statement of points filed, in its brief on appeal, nor to argue the point in the brief, will not receive consideration. (Thomas et al. v. El Dorado Irrigation Dist. (CCA 9), 126 F.(2d) 922; See, also, Zap v. U. S. (CCA 9), 151 F.(2d) 100; Martin et al. v. Sheely et al. (CCA 9), 144 F.(2d) 754.)

"To review errors alleged upon the rejection of exhibits as evidence in a case, the briefs, as required

by Rule (CCA 9), should quote the full substance of the (rejected exhibits) and refer to the page number in the transcript where the same may be found. (Hemphill Schools, Inc. v. Commissioner of Internal Revenue (CCA 9), 137 F.(2d) 961.)

"A specification that the trial court erred in ordering judgment is not a proper specification of error. It does not set out particularly, or at all, the error, if any, intended to be urged. It specifies nothing, and presents nothing for review. (U. S. v. Cushman (CCA 9), 136 F.(2d) 815. For a construction of Rule 20(d) (CCA 9), re specification of errors, and the setting out of such specifications in brief, see Monaghan v. Hill (CCA 9), 140 F.(2d) 31; Peck et al. v. Shell Oil Co., Inc. et al. (CCA 9), 142 F.(2d) 141; Conway v. U. S. (CCA 9), 142 F.(2d) 202; Tudor v. U. S. (CCA 9), 142 F.(2d) 206; Jung et al. v. Bowles, etc. (CCA 9), 152 F.(2d) 726.)

"It is essential for a proper review of a specification of error relative to the failure of the court to give an instruction, that a timely request for such an instruction, or a timely objection be made to the court's omission to give the instruction requested. (Bercut v. Park Benziger & Co. (CCA 9), 150 F.(2d) 731.)"

Third Cumulative Supplement to *O'Brien's Manual of Federal Appellate Procedure* (Third Edition), p. 91.

Notwithstanding the clear provisions of the foregoing rules of the United States Court of Appeals, for the Ninth Circuit; the doctrine of *stare decisis* with respect to the requirement that they be obeyed, in *all* cases and by *all* parties, and in disregard of the provisions of Rule 75, Rules of Civil Procedure, hereinabove referred to, this Honorable Court impliedly indicates by the form and substance of its Opinion filed April 15, 1955 that it is not necessary for the

appellant to comply with these rules or be bound by the doctrine of *stare decisis* with respect to the effect of a failure to comply with the rules simply because he happens to be a seaman; and has inadvertently overlooked its own rules, the Rules of Civil Procedure applicable to appeals and established precedent with respect to rules which have been recognized by practically all courts of appellate jurisdiction in the United States.

It appears to appellee-petitioner that the Opinion affirmatively shows that the Court has not considered the restrictions which Rule 75, F.R.C.P. have placed upon it in its use and consideration of matters or things which are completely extraneous to the valid "Record on Appeal" prepared in strict accordance with said rule. Appellee also infers from the Opinion that this Court overlooked, because of its *fallacious* assumption that it was its duty to *protect* the appellant, the obvious failure of the appellant to set out separately or particularly any claim that the Trial Court committed any error prejudicial to the rights of the appellant, with a reference to some part of the valid record on appeal which would support the contention. Appellee also contends that the Opinion shows on its face that this Court was probably misled by following unsupported statements in the appellant's briefs and did not examine the valid record on appeal to see whether such statements were or were not in accordance with the fact as shown by the record. The Opinion also shows on its face that the Brief for Appellee was not given the attention which a consideration of the substantial rights of the appellee required.

Appellee quotes from and comments upon various parts of the Opinion as follows:

> 1. "Accordingly, briefs were filed and at a subsequent session of the court, without a jury, the judge

> strongly intimated, in fact decided, that he had determined that the release was valid and suggested that defendant file a motion for a summary judgment. On the following date to which the court had continued the case for setting, the motion for a summary judgment was made by defendant." (Printed Opinion, p. 2.)

Comment A: The statement of the court near the top of page 2, printed Opinion, that "At a subsequent session of the court, (obviously referring to the first session of the court immediately after the briefs were filed) * * *, the judge strongly intimated, in fact decided, that he had determined that the release was valid" is *not* supported by either the valid record on appeal or the "Supplemental Transcript of Record" which found its way into the files of this court without any notice to the appellee that it was to be considered by this court as a valid part of the record on appeal. Appellee is not claiming and does not intend to suggest that the Court took part in or would approve the method by which this so-called "Supplemental Transcript of Record" was submitted to it as a purportedly valid supplemental record on appeal.

The said "Supplemental Transcript of Record", (Reporter's Transcript of Proceedings) on February 15, 1954, which was the first proceeding in open court after the "simultaneous" briefs were filed, shows the following:

> "The Court: I have gone over all your authorities relative to the question of the release. I have come to the conclusion that *if* this release is not good, no release is good. I *think* the release is an absolute defense; however, *I can't rule upon the matter this morning,* but *if* you will file a motion for summary judgment, I *will* rule on it. I don't *think* there is any necessity for setting the matter for trial. * * *

The Court: * * * I won't set the matter down for trial. I *will* dispose of this on a motion. * * *

The Court: There is no question of fact here. The release is a written release. *We* have *all the evidence before us.* I *can* pass upon that. I *think* I would be justified in directing a verdict on the ground the release is a complete bar.

* * * * * * *

The Court: *If* the release is no good, *then* we can try the matter before a jury and *decide* the question." (Emphasis added.) (Supplemental Transcript of Record, p. 2, l. 5 to p. 4, l. 9.)

It thus appears that the trial court did *not,* on February 15, 1954, *decide* that the release was valid. In fact, although inadvertently overlooked by this Honorable Court, the trial court was on February 15, 1954 without the slightest power to *decide* that the release was valid. The trial court was without power to decide that there was no genuine issue of material fact relevant to the validity of the release until a notice of motion and motion for a summary judgment upon that ground had been served, filed, and brought on for hearing in the manner required by the rules. The jurisdiction (the power to entertain and decide any issue) of a United States District Court is exclusively statutory.

Comment B: The "Transcript of Record" shows that on January 21, 1954 an order was entered declaring a mistrial and that the cause was continued to January 25, 1954 for resetting. (Transcript of Record, p. 67.) On January 25, 1954 there was a proceding and at that hearing the court ordered counsel to file simultaneous briefs on the question of the release and continued the case to February 15, 1954 for resetting. On February 5, 1954 defendant's 2nd Memorandum of Law was filed. On February 8, 1954 plaintiff's

Memorandum of Points and Authorities on Releases was filed.

The clerk's notation in the Civil Docket is not an accurate notation of the substance of the order actually made by the trial court with reference to the reason for the continuance. The "Supplemental Transcript of Record" shows that what the court actually stated from the bench but which was not accurately noted in the Civil Docket is as follows:

> "I will continue the *question* of setting until March 1. By that time you can file your motion?"
>
> "Mr. Sikes: Yes, your Honor."
>
> "The Court: All right." (Supplemental Transcript of Record of Proceedings on February 15, 1954, p. 4, ll. 14-18.)

Therefore an accurate statement of what happened on February 15, 1954 is that "the *question* of setting" was continued to March 1, 1954, for the purpose of permitting the defendant, in the meantime, to file a motion for summary judgment.

The next date upon which there was any proceeding was March 1, 1954. *This* was the date *following* the proceedings on February 15, 1954. On March 1 ,1954 the motion for summary judgment was *not* made by defendant. The "Supplemental Transcript of Record" shows that on March 1, 1954 the subject matter of setting the case for trial was not mentioned. The sole and only reason for the continuance from March 1, 1954 to March 8, 1954 was that the appellee had filed a motion for summary judgment on February 23 and that because of the rule requiring *ten* days' notice of the hearing of *such* motion it was necessary to notice the hearing of the motion for March 8, 1954. (Supplemental Transcript of Record, p. 6.) The defendant made the motion for a summary judgment on March 8, 1954 which was *not* "the

following date to which the court had continued the case for setting", as stated in the Opinion.

> 2. "Appellant claims that there are questions of material fact in the case which he has a right to have resolved by a jury and appellee *counters* with its *claim* that *the written release is in standard form,* that *the evidence presented to the discharged jury showed conclusively that appellant thoroughly understood the terms of the release* and *signed and accepted payment in accordance with it under legal and other advice* and *there was no 'overreaching'.*" (Emphasis added.) (Printed Opinion, p. 2.)

Comment: Appellee's counsel, believing until he read the Opinion filed on April 15, 1955, that the appellee was entitled to assume that the appellant's "Transcript of Record" and his Opening Brief would be subject to exactly the same rules and decisions as are applicable to every other party, prepared, served and filed the Brief for Appellee in the form and content which he believed adequately covered all contentions which the *appellant* had set forth in his Opening Brief (in certain particulars as to which leniency and liberality might indicate that said opening brief complied with the requirements of the rules of this Court and the decisions construing the same).

An examination of appellee's brief demonstrates that it *countered* what it considered to be the only claims of the appellant which required any answer whatever, as follows:

(I) The fact that a formal issue as to the validity of the release was raised by operation of law did not entitle the appellant, *ipso facto,* to a trial by jury with reference to that proposition.

(II) Appellant's contention that Section 55 of Title 45 U.S. Code is applicable to a release and settlement is invalid.

(III) The appellant has failed to comply with the Rules of the United States District Court, Southern District of California.

(IV) The appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration.

That part of the "Brief for Appellee" under the heading "Statement of the Case", commencing on page 2 to and including page 19 was printed *solely* because Rule 18(c) requires "a concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised"; and by reason of appellee's opinion that the appellant had not complied with the requirement of the rule at all.

Appellee at the end of its "Statement of the Case" contended as follows: "The only point which is involved in this appeal is whether there was a genuine issue as to any material fact concerning the validity of the release." This single statement at the end of the "Statement of the Case" is the only part of the "Brief for Appellee", with the exception of Points I, II, III and IV, under the specific heading of "Argument" which shows the extent or manner in which the "appellee counters" the claims of the appellant. Appellee did not in any part of its brief under the heading of "Argument" state, directly or indirectly: "that the written release is in standard form, that the evidence presented to the discharged jury showed conclusively that appellee rightly understood the terms of the release and signed and accepted payment in accordance with it under legal and other advice and there was no 'overreaching'." (Page 2, Printed Opinion.)

Perhaps this court based its statement with reference to how appellee countered the claims of the appellant upon

a misreading or misconception of the reason for including in Point III the seventeen elements commencing near the bottom of page 23 and concluded at the top of page 26. What the appellant actually stated in its brief with reference to these seventeen elements is as follows:

> "Appellant's proposed findings *stated,* among others, the following material facts *as to which it contended there was no genuine issue:* * * *" (Brief for Appellee, page 23.)

The Opinion does not decide the issues of law raised in appellee's Point I, nor Point II, nor Point III, nor Point IV.

Everything set forth in appellee's "Point III" was set forth for the sole purpose of demonstrating that "the appellant has failed to comply with the rules of the United States District Court, Southern District of California", and the effect of such failure.

> 3. "No one disputes the premise that seamen are under the protection of the court, * * *" (Printed Opinion, p. 2.)

Comment: The language "that seamen are under the protection of the courts" does not appear *in haec verba,* in substance, or at all, any place in the "Brief for Appellee". Whether a seaman is or is not "under the protection of the courts" in the sense and within the meaning of that language as the Court must have intended to use it, was not and is not a question of law submitted to this court for decision. This court is not a trial court.

There is absolutely nothing in the Transcript of Record which shows, affirmatively, directly or indirectly, that Adrian Guerrero, the appellant, claimed to have been or was at the time he executed the release, *non sui juris* for any reason. There is nothing in the Transcript of Record

which shows that during the pendency of the action in the trial court Adrian Guerrero was *non sui juris* for any reason. No application was made for the appointment of a guardian ad litem which obviously would have been done if any suggestion had been made that he needed one.

There is no suggestion in the Transcript of Record or in the "Supplemental Transcript of Record" that during the period when Adian Guerrero was negotiating the settlement or at the time he executed the release and accepted the $1500 he was an incompetent person, or mentally incompetent or "by reason of old age, disease, weakness of mind or other cause, * * * unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof * * * likely to be deceived or imposed upon by artful or designing persons." (Probate Code, California, Section 1460.)

This Court is not authorized by any judicial power vested in it by an act of Congress, pursuant to its sole and exclusive legislative power under the Constitution of the United States, to take judicial notice of the fallacy that *all* persons merely because they are "seamen" are unable, unassisted, properly to manage and take care of themselves or their property or by reason thereof likely to be deceived or imposed upon by artful or designing persons. The Federal Courts, in construing the Jones Act, have determined conclusively that every person who is on board a vessel for the purpose of aiding in her navigation, is a "seaman". This includes the licensed deck personnel (master and mates), the licensed engine room personnel (the chief engineer and assistant engineers), the quartermaster, the radio operator, the able-bodied seamen, and the ordinary seamen.

Is it the considered opinion of this Honorable Court that *solely* because these men have the *occupational status of*

"seamen" that every one of them is entitled, when he becomes a litigant, to some *special and preferential* "protection of the courts" on the theory that *none* of them is *capable* of executing a *presumptively* valid release of *a disputed claim for damages?*

Appellee is well aware of the fact that for over one hundred years immediately last past various federal courts have by *obiter dictum* stated that "seamen are wards of the admiralty", "seamen are wards of the admiralty court", "they are emphatically the wards of the admiralty", there is an analogy "between seamen's contracts and those of fiduciaries and beneficiaries". The amazing thing about this situation is that there appears to be no decision in which it appears that any ship owner or ship operator has ever challenged the validity of these assumptions or pointed out that they are premised exclusively upon an arbitrarily discriminatory and basically unsound classification of *all* seamen as persons who are by reason of old age, disease, weakness of mind, or other cause, unable, unassisted, properly to manage and take care of themselves or their property and by reason thereof are likely to be deceived or imposed upon by artful or designing persons. More will be said about this in a subsequent subdivision of this petition.

This Honorable Court did not procure from appellee any concession that there is a "premise that seamen are under the protection of the courts". Therefore the statement that "no one disputes the premise that seamen are under the protection of the courts" indicates that the court either misconceived or misunderstood the contents of the "Brief for Appellee".

> 4. "No one disputes * * * that the burden is on the employer to show the validity of the release." (Printed Opinion, p. 2.)

Comment: The appellee did not in its brief, concede "that the burden is on the employer *to show the validity of the release*". This question was not an issue in the trial court. The sole questions submitted to the trial court for decision were *whether there was or was not a genuine issue as to any material fact relevant to the validity of the release,* or with respect to *ratification.*

The statement made in the "Memorandum of Points and Authorities" served and filed with the Notice of Motion and the Motion for Summary Judgment that "there is no question but that the standard relative to releases executed by seamen is that set up by the Supreme Court in *Garrett v. Moore-McCormack Co.*" (Transcript of Record, p. 22, l. 25 to p. 23, l. 1.) is not a concession that on *a motion for a summary judgment,* there is no dispute about the proposition "that the burden is on the employer to show the validity of the release". The comment made in the "Memorandum of Points and Authorities" was probably an *erroneous* concession that under the facts of the *Garrett* case, as set forth in the Opinion by the Supreme Court, there is no question about the proposition "that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion and that it was made by the seaman with full understanding of his rights." It was, however, *"obiter dictum"* by appellee's trial court counsel. It was *not* relevant to a motion for a summary judgment where no burden of *proof* is imposed on *either* party.

Such court-created presumptions are not, in any event, admissible *in* or *as evidence* any longer because of the provisions of Rule 43(a), Rules of Civil Procedure and the act of the Congress plainly stating that *all* laws in conflict with said rules "*shall* be of no further force or effect."

The statement of the Supreme Court as to "burden" was made after a jury had decided as a question of fact that Garrett had executed a full release of a claim for damages for the sum of $100 and that at the time he executed the same he had no knowledge of having signed such an instrument and that his signature was obtained through fraud and misrepresentation and without legal, binding and valid consideration; that Garrett's discussion of the subject matter of the release with Moore-McCormack Company's claim agent took place while Garrett was under the influence of drugs taken to allay the pain of his injury; that he was threatened with imprisonment if he did not sign as directed, and that he considered the $100 a payment of wages. Garrett, according to his testimony in the trial court, if accepted by the jury, was not only induced to perform the very act of executing the release by fraud, misrepresentation and threat of imprisonment; he was also subject to a serious diminution of his normal mental faculties because of narcotics. No such claims appear, *from the record on appeal,* to have been brought to the attention of the trial court in the instant case. For these reasons it is contended by appellee that the "rule" with reference to burden of proof in the *Garrett* case would not be authoritative precedent applicable to facts in the instant case.

In any event, and regardless of the view this Honorable Court may take with reference to anything that may have been stated in the "Memorandum of Points and Authorities" filed in the Trial Court or the "Brief for Appellee" (including what was said on page 26 thereof) the entire discussion of the subject of "burden of proof" is irrelevant and immaterial to a motion for summary judgment upon the ground that there is no genuine issue of material fact relative to the validity of a release. "Burden of proof"

means that a party who asserts affirmatively in a pleading that his adversary committed any specified act or omitted to do something which he was required to do and that such act or omission proximately caused injury or damage to the plaintiff must prove such allegations by a preponderance of evidence if the answer denies such allegations and thus raises genuine issues of material fact which require a decision by a court or jury with reference to the actual truth.

It has been conclusively established by many decisions of the Courts of appellate jurisdiction in the State of New York, where the summary judgment procedure was apparently originated, and the federal courts since the promulgation of the Rules of Civil Procedure by the Supreme Court that if there is a genuine issue of material fact relevant to the determination of the ultimate fact in issue, then a summary judgment cannot be granted.

There cannot be any possible application of the "burden of *proof*" rule to the duty of the moving party in a proceeding to procure the entry of a summary judgment. The Courts cannot say in one breath that if there is a genuine issue of material fact the motion cannot be sustained and in the next breath say that the moving party must prove, by a preponderance of *evidence,* as on the trial of genuine issues of fact raised by the pleadings, that such party is entitled to an order granting a motion for a *summary* judgment.

There was no burden upon the appellant to prove conclusively or otherwise, on the motion for a summary judgment, *that the plaintiff executed the release freely or without deception or coercion, or that it was executed by him with a full understanding of his rights.*

This Court has inadvertently misconceived or misconstrued the Rules of Civil Procedure with respect to the nature of a motion for a summary judgment. A motion for a summary judgment is exactly the same, in effect, as a motion for a directed verdict with the exception of the fact that no jury happens to be in attendance at the time a motion for summary judgment is presented.

It is submitted that when one of the parties to an action on the law side of a United States District Court presents a motion for a summary judgment it is the implied, if not express, duty of the attorneys representing the respective parties to disclose to the trial court for its examination all competent and material evidence which would be introduced in the event of a trial before a jury.

The trial judge is not authorized in any such proceeding to resolve or ignore conflicts which may appear in any competent and material evidence which either of the parties discloses to the court is available to such party and which such party intends to establish by oral or documentary proof and upon which the ultimate outcome of the litigation would depend. The trial court does not make any "findings of fact" within the ordinary meaning of that phrase. If from a consideration of the material facts set forth by the trial court in the "Findings of Fact" as the only evidence which either of the parties contends is available or will be offered in evidence, it appears that there is no genuine issue as to any material fact upon which the ultimate decision might depend, the trial court so declares and thereupon renders a summary judgment.

The fact that counsel for each of the parties is bound by a clear duty to aid the court, and in the discharge of that duty required to disclose to the court the evidence upon which such party relies either in support of or in opposition

to the motion, does not justify a conclusion that any burden of *proof* is involved. There *is* a burden of *producing* for *examination* by the trial court *all* evidence, direct or indirect, which either of the parties claims supports or would support a verdict in his favor.

In *Reynolds v. Maples* (C.A. Miss. 1954) 214 F.2d 395 the court held as follows: Sufficiency of the allegations of counterclaim did not control in determining whether *plaintiff's* motion for summary judgment on counterclaim should be granted, and although burden of "proof" (sic) was on plaintiff to demonstrate clearly that there was no genuine issue of fact, *defendant was required to disclose sufficiently what the evidence would be to show that there was a genuine issue of fact to be tried.*

In *American Airlines v. Ulen* (App. D. C. 1949) 186 F.2d 529 the court held as follows: Where the complaint and answer *raised genuine issues as to material facts of negligence* but, *before* summary judgment was granted, the trial judge had in addition to the pleadings before him, interrogatories of plaintiff and defendant's sworn answers thereto which showed undeniably that defendant was negligent, plaintiff's motion for summary judgment was properly granted.

Rule 56(b), Rules of Civil Procedure, provides, in part, as follows:

> "A party against whom a claim * * * is asserted * * * may, *at any time* move *with or without supporting affidavits* for a summary judgment in his favor as to all or any part thereof." (Emphasis added.)

Rule 56(c) provides in part, as follows:

> "The motion shall be served at least 10 days before the time for hearing. *The adverse party prior to the day of hearing may serve opposing affidavits.* * * *" (Emphasis added.)

Appellant, pursuant to the provisions of Rule 56(c), had a clear opportunity to file an affidavit setting forth that he intended to *change* his testimony as it appeared in the "Transcript of Evidence" or that certain of his testimony appearing in the "Transcript of Evidence" had been given as a result of an honest mistake and that he intended to correct it in specified particulars. That is the obvious purpose of the rule.

This court has assumed that the prior proceedings which took place before a "jury", which did not result in any verdict whatever, constituted a "trial" and that the proceeding instituted by the appellee for a summary judgment was a "new trial". The court has inadvertently forgotten or overlooked the following established premise that "Trial" has been defined as follows:

> "By the definition which has met with general approval, 'A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties it may be considered a trial.' * * *
>
> "* * * and it is stated that in order to constitute a trial disposition must be made of all the material issues raised by the pleadings. There must be such proceedings after joinder of issue upon the facts, as are so far determinative of the issues that final judgment is the appropriate judicial conclusion thereof. In other words, the trial is not complete until the jury has rendered its verdict, or in the event of a trial by the court without a jury, it is not complete until the decision of the court by written findings is made and filed, unless the filing of such a decision has been waived. * * *" 24 Cal. Jur. (Trial) §§ 2 and 3; pp. 716-718.

The definition of "trial" as set forth in California Jurisprudence, *supra,* is in accord with the general and uniform definition thereof. (88 C.J.S. (Trial) § 1-§ 3, pp. 19-23.)

> "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee. It is seen that several elements are involved in this code definition, viz.: (1) a re-examination of an issue of fact: (2) re-examination in the same court; (3) re-examination after a trial and decision. The definition refers to the trials and decisions of the issues of fact in civil actions and proceedings—issues raised by ordinary pleadings—and has no reference to decisions of questions of fact on motions; or to collateral matters not put in issue by the pleadings. The 'decision' mentioned in the statute is that which was given upon the original trial of the questions of fact, and upon which the judgment is to be entered. It includes the facts found." 20 Cal. Jur. (New Trial) § 2, pp. 8-9.

The definition of "new trial" in California Jurisprudence, *supra,* is in accord with the general and uniform definition thereof, (66 C.J.S. (New Trial)) § 1, pp. 61-66.

This court, in the instant case, has stated:

> "The seaman may testify differently or correct the testimony given by him at the first trial, when questioned about it. The jury may listen to the testimony given in the trial before it and any new version, may, of course, be attacked by asking the seaman to explain his former statements, but after all is said and done, the jury decides upon its estimate of the whole evidence adduced to it in the new trial as it values it in the attendant circumstances including the credence it accords the witness." (Printed Opinion, pp. 6-7.)

Keeping in mind the premise that there was no "trial" and that the motion for a summary judgment was not a

"new trial" it is respectfully submitted that the statement of the Court last hereinabove quoted would make it utterly impossible for any United States District Court to grant a motion for a summary judgment. If the mere fact that it may be *surmised* that one of the parties involved in a motion for a summary judgment *might* in a formal trial of issues of fact before a court or jury amend, change (deliberately or honestly), modify or attempt to explain or put a different light upon testimony which he has theretofore given either in the form of oral testimony during a former mistrial or in a formal deposition or in documentary evidence which has been submitted to the trial court on a motion for a summary judgment as the only evidence within the knowledge of or available to the parties or either of them up to the instant the trial court rules upon the motion for a summary judgment, *such surmised possibilities* would effectually *preclude any trial court from ever granting any motion for a summary judgment.*

An examination of Rules 38-59, inclusive, Rules of Civil Procedure, will demonstrate that in the promulgation of said rules the United States Supreme Court recognized the following propositions: that there is no *"trial"* until a verdict is rendered and entered in the Civil Docket or the Trial Court shall find the facts "specially and state separately the conclusions of law thereof and direct the entry of the appropriate judgment"; and that there is no *"new trial"* pursuant to the Rules of Civil Procedure unless the verdict of a jury is set aside or the findings of fact and conclusions of law are set aside on motion for a new trial.

Regardless of what this court may conclude with reference to the true definition of "trial" or "new trial", there was no judgment rendered in the instant case in the trial court at any time up until the trial judge granted the appellee's

motion for a summary judgment. Rule 56(b) provides in direct, clear and concise language that the appellee in this case was entitled "at any time" to move "with or without supporting affidavits" for a summary judgment in its favor. A motion made after a mistrial had occurred is not precluded, but is specifically permitted by the phrase "at *any* time" set forth in the rule.

If the language last quoted from the printed Opinion was not intended by this court to have general application to all motions for a summary judgment but only to those wherein one of the parties happened to be employed as a seaman by the other party at the time the claim asserted by the seaman is alleged to have accrued, then this court-created exception to the general rule is clearly unconstitutional. The Rules of Civil Procedure are applicable alike to *every* litigant who is a party to *any* action in *any* federal court.

The Rules of Civil Procedure are therefore applicable to and binding upon the appellant.

As is completely developed in a subsequent subdivision of this petition, any court-created or legislative exception to a general rule may be so arbitrarily discriminatory as to be void for the reason that it is prohibited by the due process of law clause of the Fifth Amendment.

This court states: "The main question on appeal is: Did the trial judge, in the circumstances obtaining here, have the power to decide that there were no unresolved genuine issues in the case?" (Printed Opinion, bottom of page 2.)

Comment A: Appellee contends that the main question on appeal is as follows: Does it affirmatively appear on the face of the record on appeal, consisting of the "Transcript of Record" filed May 21, 1954, that the trial court committed any error in deciding that there was no genuine

issue of material fact relevant to the validity of the release; and that there was no genuine issue of material fact relevant to the contention of the appellee that the appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration?

Comment B: Does the "Statement of the Case", started in the middle of page 3 of the Opening Brief for Appellant, and concluded at the bottom of page 5 thereof, or the Specification of Errors, designated "Assignment of Errors", page 6 of said Brief, or the summary of argument, designated "Outline of Argument", page 7 of said Brief, respectively, present succinctly or at all or set out separately or particularly any contention to the effect that the trial court committed error in determining, as a matter of law, that there were no genuine issues of material fact relevant to the ultimate fact of the validity of the release or relevant to the determination of the ultimate fact of the defense based upon the doctrine of ratification; or that the trial court committed error, justifying a reversal, simply and solely because it used and considered the exhibits and the "Transcript of the Evidence" adduced before and in the presence of the trial judge during the mistrial as part of the bases upon which the trial court rendered a summary judgment in favor of the appellee?

Appellee contends that the opening "Brief for Appellant" does not contain any such required elements; and that, therefore, there is nothing for this court to review in its capacity as an appellate tribunal.

> "Appellee-defendant's notice of motion and the motion for a summary judgment refer exclusively to the validity of the release. The motion sets out, without affidavit, and without recital of the record and without inclusion

of the evidence given before the jury which failed to reach a verdict that: 'the evidence given at the trial was without dispute that: [then follows nine numbered statements which counsel has deduced from the evidence as established facts.]'

The motion ends with the following paragraph:

'CONCLUSION

'In view of the above uncontroverted facts given in sworn testimony at the trial or set out in exhibits introduced into evidence, there can be no question but that the release is valid as a matter of law; that there is no question of fact to go to the jury; and that defendant, American Hawaiian Steamship Co., a corporation, should have a summary judgment in its favor.'" (Top half, page 3, Printed Opinion.)

Comment A: Rule 7(b), Rules of Civil Procedure, reads as follows:

"(b) Motions and Other Papers.

"(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

"(2) The rules applicable to captions, signing and other matters of forms of pleadings apply to all motions and other papers provided for by these rules."

"A party against whom a claim, * * * is asserted * * * may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." (Rule 56(b), Rules of Civil Procedure.)

Comment B: There is, therefore, no requirement that the motion be accompanied by an affidavit or that there be a

"recital of the record" or that there be an "inclusion of the evidence given before a jury which failed to reach a verdict". The motion in the instant case was made in writing and stated with particularity the grounds therefor, to wit:

> "That there is no genuine issue as to any material fact and that * * * the defendant is entitled to judgment as a matter of law." (Tr. Rec. p. 22, ll. 14-16.)

The motion set forth the relief or order sought, as follows:

> "Defendant, American Hawaiian Steamship Co., a corporation, hereby moves the court for a summary judgment in its favor as to all of the claims sought by the plaintiff in the above entitled action * * *". (Tr. Rec. p. 22, ll. 11-14.)

Comment C: Rule 3(d), local rules of the United States District Court for the Southern District of California, promulgated by the judges of said court with unquestionable authority pursuant to Rule 83, Rules of Civil Procedure, requires that "there shall be served and filed with the *Notice of Motion* or other application and as a part thereof, * * * a brief, but complete, written statement of all reasons in support thereof, together with a Memorandum of the Points and Authorities upon which the moving party will rely. Each party *opposing* the motion or other application *shall* (A) within five days after service of the notice thereof upon him, serve and file a brief, but complete written statement of all reasons in opposition thereto and an answering memorandum of points and authorities, or a written statement that he will not oppose said motion, and (B) not later than one day before the hearing, serve and file copies of all * * * documentary evidence upon which he intends to rely.

* * * * * * *

> "* * * in the event an adverse party fails to file the instruments and memorandum of points and authorities provided to be filed under this rule, such failure

> *shall* be deemed to constitute a consent to the * * * granting of said motion or other application." (Rule 3(d), Rules, U. S. District Court, Southern District of California; Emphasis added.)

The appellant did not serve or file "a brief, complete, written statement of all reasons in opposition" to the granting of the motion for a summary judgment. In fact the transcript of record fails to show that the appellant served or filed any written statement, brief or complete or otherwise, of reasons in opposition to the motion.

Comment D: The nine numbered statements referred to, but not set forth in the opinion, were set forth in the Memorandum of Points and Authorities in compliance with the local rule which required the appellee to serve and file with the *Notice of Motion* "a brief, but complete, written statement of all reasons in support thereof." In addition to the nine numbered reasons in support of the motion, the "conclusion" set forth an additional and comprehensive statement of reasons in support of the motion as follows:

> "In view of the above uncontroverted facts given in sworn testimony at the trial or set out in exhibits introduced into evidence, there can be no question but that *the release is valid as a matter of law; that there is no question of fact to go to the jury;* and that defendant, * * *, should have a summary judgment in its favor." (Tr. Rec. p. 29, ll. 5-11.)

The *motion* did not end with the paragraph entitled "Conclusion" as stated by the court in its Opinion. The "Conclusion" was part of the reasons in suport of the motion.

> "It is not contended that the 'pleadings' in the case show there are no 'genuine issues'. There are no 'depositions', or 'affidavits' filed with the motion; and there

are no 'admissions' set up in the motion." (Printed Opinion, bottom of page 3.)

Comment A: The fact that the pleadings in the action raise issues of fact is immaterial on a motion for a summary judgment. If the rule were otherwise a summary judgment could not be rendered in any case where the pleadings raised issues of fact. If a complaint does not contain simple, concise and direct averments showing that the pleader *is* entitled to relief (Rule 8(a)(2); (e)(1), Rules of Civil Procedure.) the applicable remedy is a motion to dismiss pursuant to Rule 12, Rules of Civil Procedure.

> "The court must look beyond the pleadings and determine whether there is a genuine issue of material fact to be tried." (*Griffith v. Wm. Penn Broadcasting Co.*, 4 F.R.D. 475, 467.)

The decision in the *Griffin* case was cited as authority by this court near the bottom of page 9, printed Opinion. The objective of a motion for summary judgment is to separate the formal from the substantial issues raised by the pleadings. (*Walling v. Fairmont Creamery Co.*, 139 F. 2d 318.)

> "The purpose of the procedure, Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings." (*Koepke v. Fontecchio,* (9th Cir.) 177 F. 2d 125, 127.)

The court examines evidence on a motion for summary judgment, not to decide any issue of facts which may be presented, but to discover if any real issue exists. (*Sprague v. Vogt,* 150 F. 2d 795.)

This rule contemplates that the District Judge shall take the pleadings as they have been shaped to see what issues of fact they make and then shall consider the depositions and admissions on file together with the affidavits to see if any such issues are real and genuine, and if they are not, judgment is given without further trial. (*Town of River Junction v. Maryland Casualty Co.,* 110 F. 2d 278, cert. denied, 310 U.S. 634, 84 L. ed. 1404.)

On application for summary judgment, the formal issues presented by the pleadings are not controlling, and the court must ascertain from an examination of the proof submitted whether a substantial triable issue of fact exists. (*Edward B. Marks Music Corp. v. Stasny Music Corp.,* 1 F.R.D. 720.)

A genuine factual issue is not raised merely by the formal allegations of pleadings, and if the District Court is satisfied that the facts in the case, as disclosed by pleadings, affidavits, admissions, depositions *and other matters considered,* are such that it would be required upon a trial of the case to direct a verdict for the moving party, no genuine issue of material fact exists and summary judgment should be granted. (*Pool v. Gillison,* 15 F.R.D. 194.)

Comment B: No rule set forth in the Rules of Civil Procedure requires a deposition or an affidavit to be filed with the motion. Rule 56(c), Rules of Civil Procedure, refers to "the pleadings, depositions, and admissions *on file*" at the time the motion for summary judgment is actually presented to, considered and ruled upon by the trial court. It is at *that* time, not the time when the written motion was served and filed, that Rule 56(c) refers to.

Comment C: The "Transcript of Record" shows that depositions were on file at the time the motion was served and filed and at the time the motion was presented to, considered and ruled upon by the trial court.

"3/23/53 FLD depos of Carl William Hamilton" (middle of page 66, Tr. Rec.)
"5/8/53 FLD deposn of Hoyle J. Welch tkn 4/30/53" (bottom of page 66, Tr. Rec.)
"1/2/54 * * * FLD exbs & list thereof. Ent ord deposns be opened. * * *" (Tr. Rec. p. 67, ll. 12-13.)

The "Findings of Fact" by a recital show that the *plaintiff's* deposition was taken on October 27, 1952. (Tr. Rec. p. 38, ll. 9-10.)

The "Supplemental Transcript of Record", page 3, line 3, contains the following statement of the trial judge: "We *have* a *transcript of the evidence.*" This statement was made on February 15, 1954, and it establishes as a fact that at said time, prior to the serving or filing of the motion for a summary judgment, "a transcript of the evidence" was a part of the files and records of the case.

In the case of *Whitaker v. Coleman,* 115 F.2d 305 also cited by this court near the bottom of page 9, printed Opinion, the court held that where a party at a hearing under the summary judgment procedure instituted by his opponent proffered a transcript of testimony at a former trial, arising out of a prosecution under the state law on a manslaughter charge, which apprised the judge that there was relevant evidence which such party could and would tender on a trial before a jury on a fact issue determinative of the litigation, the granting of a summary judgment against said party was error regardless of any defects in the certification and presentation of said transcript.

It seems obvious, and appellee so contends, that if such transcript of testimony is admissible for the purpose of showing the trial court that there was relevant evidence which when offered would raise a genuine issue of material fact, the "Transcript of evidence" referred to by the trial

court in the instant case was also a proper matter to be considered by the trial court.

In addition to the foregoing observation, Rule 43(e) Rules of Civil Procedure provides as follows:

> "When a motion is based on facts not appearing of record, the court may hear the matters on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

The foregoing rule specifically authorized the trial court to consider the oral testimony that he had heard and which had been reduced to written form in the "Transcript of the Evidence".

Furthermore, the "Transcript of the Evidence", if properly certified by the official reporter, comes within the ordinarily understood definitions of the word "deposition". (26 C.J.S., 807, § 1. Law Dictionary, Ballentine; Anderson's Law Dictionary; Words and Phrases, Annotated.)

Comment D: There are "admissions" shown in the moving papers. At the bottom of the release, the following appears:

> "THIS IS A GENERAL RELEASE
>
> "I have read and understand the above. * * * Adrian Guerrero"

This affirmative written statement, *in the handwriting of the appellant,* and written at the same time that he placed his signature on the release directly below such affirmative statement, is certainly an admission that he had read and understood the contents of the document *and* that it was "a general release". If a request that the appellant admit that he had read and understood the release before he executed it had been directed to the appellant pursuant to Rule 36, Rules of Civil Procedure, and he had answered: "I did read and understand the general release which I

executed" would such admission be any more of an admission than his affirmative statement, in his own handwriting, at the bottom of the release? Appellee respectfully submits that the affirmative statement of the appellant is at least the equivalent of an admission.

The said release was on file as an exhibit at the time the summary judgment was rendered. It was quoted *verbatim* in the proposed findings then on file. It was an exhibit in the file.

In addition the appellee claimed in the brief for appellee and still contends "that the failure of the appellant to serve and file a brief, but complete, written statement of all reasons in opposition" to the motion constituted an admission of the seventeen elements set forth on pages 23-26 of the "Brief for Appellee".

The "Transcript of Record" does not affirmatively show that the trial court did *not* in granting the motion for a summary judgment assume that the facts as claimed by the appellee were admitted to exist without controversy. Appellee asserts, with confidence, that the rules governing the consideration and decision of a case by an appellate tribunal, requires such tribunal to presume the existence of all things which will support the judgment unless the contrary affirmatively appears from an inspection of the face of the record on appeal. There is absolutely nothing in the "Transcript of Record" or the "Supplemental Transcript of Record" which affirmatively shows that at the time the trial judge orally granted the motion or signed the findings of fact, conclusions of law and judgment he did *not* assume that the facts as claimed by the appellee in its proposed findings of fact were admitted to exist without controversy because of the fact that there was a failure on the part of the appellee to controvert any thereof in any statement

filed in opposition to the motion. These "admissions" were on file on March 8, 1954 when the trial judge granted the motion for summary judgment by oral order and also on March 26, 1954, when the trial judge signed the "Findings of Fact", "Conclusions of Law" and the "Judgment".

What went on in the mind of the trial judge on and between March 8, 1954 and March 28, 1954 as to assumptions is not affirmatively revealed on the face of the record on appeal. The act of assuming anything is a mental process.

Ground Four

It is respectfully contended that Ground Four of the Petition is in all probability sufficiently argued in ground "4" (Grounds of Petition for Rehearing), pp. 12-14, *supra*. In any event the subject of Ground Four has been brought to the attention of the Court.

The only additional argument which might be necessary is to call the attention of this Court to the proposition that the statute pursuant to which the Supreme Court was authorized to promulgate the Rules of Civil Procedure and the plain language set forth in the rules with reference to motions in general, motions for a summary judgment, and the *form* in which the available evidence is required to be exhibited to the Trial Court for its examination in determining whether a motion for a summary judgment should or should not be granted must be equally applied to all litigants regardless of occupation or economic status. Any attempt of a Court, or even the Congress, to introduce an arbitrarily discriminatory exception to the general applicability of the rules and to provide by such exception that Rule 56, F.R.C.P. requires different treatment for seamen than it does for any other litigant would be clearly unconstitutional.

Ground Five

The judgment of this Court with reference to the lack of applicability of the general rules with respect to rescission and ratification, holding that such general rules are not applicable to a seaman solely because of his occupational status is in conflict with the following decisions: *Panama Agencies Co. v. Franco,* 111 F.2d 263; *Reinhardt v. Weyerhaeuser Timber Co.,* 144 F.2d 278; *Graham v. Atchison T. & S. F. Ry. Co.,* 176 F.2d 319; *Callen v. Pennsylvania R. Co.,* 332 U.S. 625; 92 L.ed. 242. The conflict between the judgment of this Court and the Federal Rules of Civil Procedure; the rules on appeal promulgated by this Court; and the due process of law clause of the Fifth Amendment, Constitution of the United States, has already been argued in preceding subdivisions of this petition; and will be referred to in the presentation of a point to be hereinafter discussed.

Ground Six

The mandate of the Fifth Amendment, Constitution of the United States that "no person shall * * * be deprived of * * * property, without due process of law" is binding upon and limits the power of all branches of the government of the United States, including the federal courts.

The decision relied upon by this court in support of its statement "that the burden is on the employer to show the validity of the release" is in the case of *Garrett v. Moore-McCormack,* 317 U.S. 239; 87 L.ed. 239. The "burden of proof rule" as stated by the Supreme Court is as follows:

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with *full* understanding of his rights. The *adequacy* of the consideration and the

nature of the *medical and legal* advice *available* to the seaman at *the* time of signing the release are relevant to an appraisal of this understanding." (*Garrett v. Moore-McCormack,* 317 U.S. 239, 248; 87 L.ed. 239, 245; Emphasis added.)

With respect to the Jones Act, the Supreme Court has stated as follows:

> "The Act thus made applicable to seamen injured in the course of their employment the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees."
>
> *O'Donnell v. Great Lakes, etc. Co.,* 318 U.S. 36, 38-39; 87 L.ed. 596, 599.

To the same effect, please see *De Zon v. American President Lines, Ltd.,* 318 U.S. 660-675; 87 L.ed. 1065, 1069.

Legislation pursuant to which an existing statute or portion thereof is adopted by reference thereto is common practice.

Therefore, the basic factual bases of the statutory cause of action created by the Jones Act are those portions of the Federal Employers' Liability Act which *modify or extend* the *common law right or remedy* in cases of personal injury to railway employees. In other words, all seamen and all interstate railway employees have been placed in an *identical* category by the Congress.

Prior to the enactment of the Federal Employers' Liability Act all railroad companies, interstate and intrastate alike, possessed the right to assert all of the defenses to actions for damages for personal injury theretofore recognized by the common-law. These defenses were: contributory negligence; assumption of risk of all obvious dangers

and assumption of all risk of injury proximately resulting from the negligence of a fellow servant. The said railroad employers were, in any action commenced against them for damages for personal injuries, also entitled to plead as a special defense any contract pursuant to which any employee had released and discharged such railroad of and from all claims for damages by reason of bodily injuries suffered as a proximate result of claimed actionable negligence on the part of the employer. The sole burden of proving by a preponderance of evidence that such release was void was always imposed upon the plaintiff and the plaintiff in such action was barred, as a matter of law, from maintaining such action after the pleading of such release by the defendant unless he could prove by affirmative evidence that the release was void *ab initio* or that it was voidable at his option and he had exercised the option by rescinding the same and restoring or offering to restore the consideration which had been paid to him therefor. In *such* cases, whenever the release involved was not claimed to be void but merely voidable, ratification of the voidable contract of release by a retention of the consideration was also a complete bar to recovery, regardless of whether or not the injured employee had good, fair or poor proof of actionable negligence available to him in the first instance and regardless of whether his injuries were slight, moderate or severe. The foregoing contentions of appellee-petitioner as to *voidable* releases are intended to refer to railway employees who were *sui juris* at the time of the execution of the release involved.

It must be presumed that the Congress had all of these defenses in mind when it originally enacted the Federal Employers' Liability Act and when it amended the same

from time to time up to and including the date of the enactment of the Jones Act on June 5, 1920.

It must also be presumed that the Congress knew what it was doing when it provided, with reference to the *statutory* cause of action created by the Jones Act in favor of seamen suffering personal injury in the course of their employment, that "*all* statutes of the United States *modifying or extending* the common-law right or remedy in cases of personal injury to railway employees *shall* apply; * * *" It must also be presumed that the Congress had in mind and took cognizance of the extent to which the old defenses theretofore available to interstate railroad companies in a common law action for damages had been modified.

The Congress must be presumed to have been cognizant of the following: That in suits in equity to rescind a contract of release the affirmative burden is without exception imposed upon the plaintiff to show by a preponderance of all the evidence that the release is void *ab initio* or that equitable grounds of rescission exist; and that all conditions precedent to an involuntary rescission have been complied with; that when a release is pleaded by a defendant in an action at law the defendant establishes the *prima facie* validity of the release by proving that the plaintiff actually executed the same and received therefor a consideration in lawful money of the United States; and that unless the releasor *controverts* such *prima facie* defense by the introduction of *affirmative* evidence, said defense is complete and there is nothing more to the case but to enter final judgment in favor of the defendant.

A general release is a common-law *right of* defense. The common-law has always furnished a *remedy* to protect such right of defense. Nowhere in the "Jones Act", a *statutory* cause of action, does the Congress use *any* language indi-

cating directly or indirectly that it had the slightest intention to modify or extend said common-law right of defense or the common-law remedy with respect thereto.

Appellee-petitioner, in the "Brief for Appellee" at page 21 cited the case of *Callen v. Pa. R. Co.,* 332 U.S. 625, 630-631, 92 L.ed. 242, 246. This case was cited in response to the contention of the appellant that by reason of Title 45, U.S. Code section 55 the release executed by appellant was *void.*

In view of the fact that appellee in its brief did not specifically explain what it contended was decided by the Supreme Court with reference to the subject of burden of proof and did not quote everything said by the Supreme Court with reference to that subject, it will do so now, as follows:

> "We are urged, however, to decide in this case that the release was properly disregarded by the trial court upon the ground that the burden should not be on one who attacks a release, to show grounds of mutual mistake or fraud, but should rest upon the one who pleads such a contract, to prove the absence of those grounds. It is not contended that this is or ever has been the law; rather, it is contended that it should be the law, at least as to railroad cases. The *amicus* brief puts it that 'We ask that the burden of establishing the validity of a release taken from a railroad employee under the Federal Employers' Liability Act be placed on the railroad, and that, where but a nominal sum has been paid, which is less than or even equal to only the wages lost, that fact of itself be held to be evidence of at least a mistake of fact, if not presumed fraud, since the railroad possesses superior facilities for determining the extent of the injuries * * *' Considerable reliance is placed upon a concurring opinion in the Court of Appeals for the Second Circuit in Ricketts v. Pennsylvania R. Co., 153 F2d 757, 760, 164 ALR 387. However

persuasive the arguments there stated may be that inequality of bargining power might well justify a change in the law, they are also a frank recognition that the Congress has made no such change. *An amendment of this character is for the Congress to consider rather than for the courts to introduce.* If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie validity,* it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the *Congress* changes the *statutory* plan, the releases of railroad employees stand on the *same* basis as the releases of *others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.*

"The plaintiff has also contended that this release violates § 5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter shall to that extent be void.' 35 Stat. 66, c 149, 45 USCA § 55, 10A FCA title 45, § 55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." (Emphasis added.)

Callen v. Pennsylvania R. Co., 332 U.S. 625, 629-631; 92 L.ed. 242, 246.

The Supreme Court clearly held that any exception to the general rule with reference to the burden of establishing the validity of a release, "is for the Congress to consider *rather than for the courts to introduce.*" The holding is also clear that "until Congress changes the *statutory* plan, the releases

of railroad employees stand on the *same* basis as the releases of *others.*"

This clear language is just as applicable to releases of maritime employees as it is to railroad employees and should be enough to demonstrate that the burden of proof rule *introduced* by the Supreme Court in the *Garrett* case is invalid, *if* the court intended to enunciate a general rule applicable to all releases executed by seamen.

If the Supreme Court possessed power, pursuant to the Constitution of the United States, to establish by judicial fiat the burden of proof rule with reference to the validity of a release executed by a person who happened to be a seaman, at the time he sustained bodily injuries upon which he later predicated a claim for damages against the company which *was* his employer at said time, then there can be no question about the proposition that the standard relative to burden of proof is as stated by the Supreme Court in the *Garrett* case. Appellee has at no time *conceded* the premise "that the burden is on the employer to show the validity of the release." Specifically, appellee has at no time conceded that the burden of proof rule stated by the Supreme Court was within the judicial power vested in it by the constitution.

It does not appear from anything stated by the Supreme Court in the course of the decision in the *Garrett* case that there was any contention that there was an absence of judicial power to establish the "court-made" rule as to burden of proof in reference to a "seaman's" release. The mere fact that the Supreme Court and the attorneys involved in that case impliedly assumed and conceded, respectively, that the Court was lawfully authorized to create such rule is of no importance, and does not reach the dignity of *stare decisis,* when the constitutional point is directly raised in a subsequent case.

The contention that the "court-made" rule is void because it is in contravention of the due process of law clause of the Fifth Amendment is hereby directly raised. Appellee respectfully contends that this Court cannot predicate an opinion reversing the judgment of the trial court upon the ground that the "court-made" burden of proof rule announced in the *Garrett* case is valid *or applicable to the record on appeal in the case at bar.* The burden of proof rule of the *Garrett* case, if intended to be applicable to all releases executed by seamen, is bottomed squarely and solely upon the premise that Garrett happened to be employed as a seaman on and a member of a crew of a vessel operated by Moore-McCormack Company at the time he suffered the bodily injuries which were the subject matter of the release.

The *"subject-matter"* of all contracts pursuant to which an injured person, for a valuable consideration, releases the claimed tort feasor is the same whether the injury which is the basis of the claim for damages occurred on land or on sea. The general law applicable to the validity of releases executed by persons in the full possession of normal faculties is not concerned with the occupational status of the releasor at *the* time he sustained the injury or with the fact that at *said* time the relationship of employer and employee existed between the claimed tort feasor and the releasor. That is not a *confidential* relationship. The law does not refer to releases as a "brakeman's release", "carpenter's release", "electrician's release", "engineer's release", "conductor's release", "chambermaid's release", "cook's release", etc. There is no logical basis for characterizing the release signed by Garrett or the release signed by Guerrero as "a *seaman's* release". When a man has suffered an injury while working as a seaman and he later executes a contract of release, he is not executing the release *as* a

"seaman". He executes the release in his status as an individual pursuant to his constitutional right to make a valid and binding contract, upon the *same* basis and subject to the *same* rules which are applicable to all adult persons in the full possession of normal faculties of perception. Every release is a contract. A person *sui juris* who executes a *voidable* release is authorized to rescind the same upon well established grounds but must do so promptly after discovery of the existence of one or more of the recognized bases of rescission and he must at that time restore or offer to restore the consideration. No person, whether he happens to make his living as a seaman or in the pursuit or any other vocation, has the right to retain the consideration, or any part thereof, which he received, unless he received it in consideration of releasing a claim for damages or some other chose in action as to which he would have been entitled to recover a judgment as a matter of *absolute* right. In such latter case the courts rightfully hold that if the releasor was fraudulently induced to execute a release which literally construed included claims which he was fraudulently led to believe were not the subject of the release, then he is entitled to retain the consideration and need not return it as a condition precedent to the maintenance of a suit for damages. These rules apply to all persons alike and in every such case the burden of proof is imposed exclusively upon the releasor to show by a preponderance of evidence the existence of one or more of the recognized bases pursuant to which a court or jury may declare such release *void*. If such release is merely *voidable,* the consideration must be returned or at least offered to the releasee before or at the time the releasor indicates an intention to disavow it. This rule applies to *all* adult persons in the possession of normal faculties of perception. (*Callen v. Pa. R. Co.,* 332 U.S. 625, 92 L.ed. 242.)

What the Supreme Court of the United States did in the *Garrett* case is to erect an arbitrary discrimination in favor of a single specie of the genus "releasor" and an arbitrary discrimination against a single specie of the genus "employer".

It is respectfully contended that the Supreme Court of the United States was without lawful power to do this. This "court-made" rule is no less vulnerable to attack upon the ground that it contravenes the due process clause of the Fifth Amendment than would be an act of the Congress to the same effect.

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of *equal protection* and due process, both stemming from our American ideal of fairness, are *not* mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable phrases, *but, as this court has recognized, discrimination may be so unjustifiable as to be violative of due process.*
>
> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.
>
> * * * * * * *
>
> "Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law *extends* to the *full range of conduct which the individual is free to pursue,* and it *cannot* be restricted *except for a proper governmental objective.*" (Emphasis added.)
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> *Bolling, et al. v. Sharpe, et al.,* 347 U.S. 497, 499-500, 98 L.ed. 884, 886-887.

Appellee contends that classifications based solely upon an occupational status must likewise be scrutinized with particular care, since they are also contrary to our traditions and hence constitutionally suspect.

In support of its statement that "discrimination may be so unjustifiable as to be violative of due process" the Supreme Court cites *Detroit Bank v. United States,* 317 U.S. 329, 87 L.ed. 304; *Currin v. Wallace,* 306 U.S. 1, 13, 14, 83 L.ed. 441, 450, 451; and *Steward Machine Co. v. Davis,* 301 U.S. 558, 585, 81 L.ed. 1279, 1290.

The eldest case is *Steward Machine Co. v. Davis.* The basic question involved in that case was the validity of the tax imposed by the Social Security Act on employers of eight or more. (301 U.S. 548, 573; 81 L.ed. 1279, 1283.)

The second eldest case is *Currin v. Wallace.* That case involved the following situation: "Plaintiff, Tobacco Warehousemen and Auctioneers in Oxford, North Carolina, seek a declaratory judgment that the Tobacco Inspection Act of August 23, 1935, is unconstitutional and an injunction against its enforcement." (306 U.S. 1, 5; 83 L.ed. 441, 445-446.)

The latest case is *Detroit Bank v. United States.* In that case the questions involved were stated by the court as follows:

> "The questions for decision are:
>
> (1) Whether the lien for federal estate taxes authorized by § 416(a) of the Revenue Act of (February 26) 1926, 44 Stat. at L. 9, 80, 26 USCA Int Rev Acts 1940 ed. p. 253, attaches to the interest of the decedent in an estate by the entirety.
>
> "(2) Whether the lien is required to be recorded under the provisions of Rev Stat § 3186, as amended, in order to give it superiority to the lien of a mortgagee who acquired his mortgage for value in good faith without knowledge of the tax lien.

"(3) Whether § 315(a), so applied as to give the lien superiority over such subsequent mortgages, offends the Fifth Amendment." (*Detroit Bank v. United States,* 317 U.S. 329, 330-331; 87 L. ed. 304, 307.)

It is thus obvious that none of the cases cited by the Supreme Court in the *Bolling* case in support of its statement that "as this court has recognized, discrimination may be so unjustifiable as to be violative of due process' was a case involving a claim of arbitrary discrimination upon the ground of "race". It is respectfully submitted that this should be enough to convince this Court that any rule with reference to burden of proof which is predicated solely and exclusively upon the occupational status of one of the parties is an arbitrary discrimination which is likewise so unjustifiable as to be violative of the due process of law clause, Fifth Amendment, Constitution of the United States.

Although the *Bolling* case (supra) involved "the validity of segregation in the public schools of the District of Columbia" the basic principle of law underlying the decision of the Supreme Court is also applicable to the question involved in this subdivision of this petition. The segregation of negroes from whites in the public school system of any state is only another name for arbitrary discrimination. In other words, out of all the various races attending public schools segregation of negroes was made on the sole premise that they were negroes. This is no different than segregating men who when employed make their living as seamen from other workmen in other industries, all of whom possess normal faculties of perception, or than segregating persons who happen to be the employers of *such* "seamen" at the time they may have suffered an injury from all other employers or ex-employers of workmen in all other industries.

The Supreme Court of the United States was and is

without lawful power to create a binding rule of law that in *every* case where a release is executed by a person whose occupation is that of "seaman", the burden is upon the person who pleads a release executed by such person to show by *affirmative* evidence that it was executed freely, without deception or coercion, and that the "seaman" executed the release with full understanding of his "rights". The "due process of law" clause of the Fifth Amendment prevents the Supreme Court of the United States or any other court from creating any such rule.

The court-made rule refers specifically to the question of burden of proof but it is based upon the assumed premise that *solely* by reason of the occupational status of the *releasor* and the existence of an employer-employee relationship upon the date of the *accrual* of his claim for damages all of the presumptions against its validity are justified and that, therefore, the *releasee* must not only controvert but *overcome* the presumptions. These court-created presumptions are unconstitutional for the same reasons that they would be if the Congress had established them by statute.

> "The rules of evidence, however, are established not alone by the courts but by the legislature. * * * But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of the state legislature to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.
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> * * *
>
> Under our decisions, a *statutory* presumption *cannot* be sustained if there be *no rational connection* between *the* fact proved and *the* ultimate fact *presumed*, if the inference of the one from proof of the other is arbitrary because of lack of connection between the

two in *common experience.* This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." (Emphasis added.)

Tot v. United States, 319 U.S. 463, 467, 468; 87 L. ed. 1519, 1524.

A statute or court-made rule creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the guarantee of the Constitution that no person shall be deprived of his or its property without due process of law, since legislative or judicial fiat may not take the place of fact in the judicial determination of issues involving substantial property rights. (*Western & A.R.R. v. Henderson,* 279 U.S. 639, 73 L. ed. 884; *Bandini Petroleum Co. v. Superior Court of California,* 284 U.S. 8, 76 L. ed. 136; 110 Cal. App. 123.)

Legislation (or court-made rule) that proof of one fact (or the conceded existence of a particular *occupational* status) shall constitute *prima facie* evidence of the main fact in issue violates the due process of law clause when the relation between *the* fact found and the presumption is not *clear and direct. (Adler v. Board of Education,* 342 U.S. 485, 96 L. ed. 517.)

The Supreme Court, in the *Garrett* case, impliedly limits the artificial erection of the well-nigh incontrovertible presumptions of invalidity to a single specie of contracts which a seaman has a lawful right to execute both under the constitution of the United States and the constitutions of the various states. The only specie of the genus "contract"

referred to in the "rule" is "a seaman's release". There are many contracts which a person who makes his living as a seaman may execute or may enter into with other persons. For example, if one seaman lends money to another seaman, while aboard a vessel on navigable waters of the United States, and the one who borrows the money executes a promissory note in favor of the other and acknowledges therein the receipt of the money which is the subject of the promissory note, is the promissory note presumptively invalid? If in the assumed case the seaman who borrowed the money and executed the promissory note repays the money and procures a receipt and release with reference thereto and the lender acknowledges on the face of the receipt the payment of the money and specifically releases the borrower of and from all claims and demands predicated upon the promissory note, what would be the rule with reference to the burden of proof if the seaman who had loaned the money brought suit against the one who had borrowed the money and the latter pleaded *in haec verba,* as his sole and only defense, the receipt and release which had been executed by the lender? Which one of them would have the burden of proving by a preponderance of evidence that the receipt and release was invalid upon one of the grounds recognized by statute or equitable principles as the bases of invalidity of a contract which is apparently lawful on its face? In view of the rule stated in the Garrett case, can a "seaman" execute a presumptively valid and binding mortgage or a presumptively valid and binding release of a claim for damages against a person who was *not his employer* at the time it accrued, arising out of an automobile accident suffered while the seaman is actually engaged in the course and scope of his employment as a seaman and member of the crew? If contracts of the type immediately hereinabove

specified are presumptively valid and binding upon every "seaman", upon what possible, reasonable or rational ground can a single specie of the entire genus "contract" be excised therefrom and the "court-made" rule of the Garrett case be applied exclusively to an *ex*-employer of an individual possessing normal faculties of perception who happened, at the time of the accrual of an alleged or claimed cause of action for damages, to be a seaman and member of the crew of a vessel owned or operated at said time by the *ex*-employer?

The release involved in the case at bar was not executed by appellant *as* a "seaman". At the time of the negotiations leading up to it and at the time of its execution, the appellant and appellee were legal *strangers*. The relationship of employer and employee had long since ceased to exist. No fiduciary or confidential relationship of any kind existed between the appellant and the appellee at *any* time, *including* the period when appellant was acting *as* a seaman and member of the crew of appellee's vessel.

The court-made "burden of proof" rule, *if* intended to apply to all releases executed by "seamen", is premised exclusively upon the single fact that *at the time* Garrett *sustained bodily injuries* he *was* a seaman and member of the crew of a Moore-McCormack Company vessel. Upon this fact alone, the Supreme Court by judicial fiat created the following conclusive presumption: The relationship between Garrett and Moore *at the time of the execution of the release* was equivalent to that of "guardian and ward" or "trustee and cestui"; and the following "disputable" presumptions: (1) That the release was not executed freely. 2. That it was procured by deception or coercion. 3. That it was executed by Garrett without a full understanding of his rights. 4. That the nature of the medical and legal

advice available to Garrett at the time he signed the release was not adequate to enable him to have a full understanding of his rights. 5. That the amount paid as a consideration, regardless of how much or little, was inadequate.

Assuming, without in the slightest degree conceding, that the language used by the United States Supreme Court is broad enough to apply the burden of proof rule enunciated therein to *all* cases involving seamen who have executed releases, it seems obvious that the court did not intend to do so.

What any court of appellate jurisdiction may have said with reference to any rule of law in a particular case must be read and understood in the light of the facts to which the rule of law was applied.

In *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 87 L. ed. 239, Garrett placed his signature on a full release for a consideration of $100. Garrett denied

> "that he had any knowledge of having signed such an instrument, (and) asserted that if his name appeared on it, his signature was obtained through fraud and misrepresentation and without 'legal, binding and valid consideration.'
>
> "The petitioner did execute a release for $100 * * *. His testimony was that his discussion with respondent's claim agent took place while he was under the influence of drugs taken to allay the pain of his injury. That he was threatened with imprisonment if he did not sign as directed and that he considered the $100 as payment of wages. The respondent's evidence was that the $100 was paid not for wages but to settle all claims grown out of the petitioner's injuries, that the petitioner had not appeared to be under the influence of drugs, and that no threats of any kind were made."
>
> *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 241; 87 L. ed. 239, 241.

Thus if Garrett's testimony was accepted by the jury in preference to that of the claims agent, the only contract which Garrett had made was a release with reference to wages. This was owing to him, as a matter of absolute right, whether the $100 was paid for wages actually earned or on account of wages to the end of the voyage. In that case, there would be no consideration whatever for the release of Garrett's claim for damages pursuant to the Jones Act.

If, in fact, the Moore-McCormack Co. did not actually owe the total sum of $100 on acount of wages, the difference between that amount and the total sum paid would not have validified the release insofar as it related to the claim for damages if the jury accepted his version that his signature was procured through fraud and misrepresentation, that he was under the influence of drugs at the time of signing the same and that he was threatened with imprisonment if he did not sign as directed. A finding by the jury in his favor with reference to these contentions would necessarily require an ultimate finding that he had not entered into the contract of release at all and that the act of executing it was induced by fraud, duress and coercion.

The opinion of the Supreme Court shows on its face that it was not called upon in that case to consider or decide, as a disputed question of law, the question of burden of proof which would have been applicable if Garrett's case had been tried on the admiralty side of a United States District Court.

> "Respondent made a motion for a new trial and judgment non obstante veredicto which under the Pennsylvania practice was submitted to the trial court en banc. That court gave judgment to the defendant non obstante veredicto, not upon an appraisal of disputed questions of fact concerning the accident, but because of a conclusion that petitioner had failed to sustain the

> burden of proof required under Pennsylvania law to invalidate the release. It conceded that 'in Admiralty cases, the responsibility is on the defendant to sustain a release rather than on a plaintiff to overcome it,' but concluded that since petitioner had chosen to bring his action in a state rather than in an admiralty court, his case must be governed by local, rather than admiralty principles."
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> *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 241-242; 87 L. ed. 239, 241-242.

Moore-McCormack Co. did not present to the Supreme Court in the *Garrett* case any *dispute* with reference to the *validity* of the so-called burden of proof "rule" in admiralty and maritime cases as it had been enunciated theretofore by federal courts in cases tried on the admiralty side of said courts. The only point submitted by the company to the Supreme Court for decision, as a disputed question of law in the *Garrett* case, was that the state courts of Pennsylvania should have applied the state rules with reference to burden of proof rather than what Moore-McCormack *conceded* was a valid burden of proof rule applicable to similar cases in the courts of admiralty. The real dispute submitted to the United States Supreme Court was not whether the so-called admiralty burden of proof rule was valid but whether it was a part of the substantive maritime law or merely an incident of procedure. The Supreme Court held that the admiralty rule which was conceded by Moore-McCormack Company to be valid was a part of the substantive admiralty law and therefore applicable to the trial of the action in the state court.

The decision of the Supreme Court, therefore, is not authoritative precedent for the proposition that the burden of proof rule theretofore enunciated by courts sitting

in admiralty was a valid exercise of the judicial function.

The mere fact that the Supreme Court recapitulated the "assumed" admiralty burden of proof rule with reference to releases in its opinion does not support a contention that it was *deciding* the *validity* of that rule as a *disputed question of law* in the case.

For the foregoing reasons it is obvious that the decision is not authoritative precedent in the instant case.

There are other valid reasons demonstrating that the decision in the *Garrett* case is not applicable to the issues of law involved in the instant case.

A motion for a summary judgment is in the same class as a motion for a directed verdict. "Burden of proof" is involved only when there is a trial of genuine issues of material fact before a duly constituted tribunal which has the power to resolve conflicts and thereupon decide the ultimate fact in issue. In order to prevail on a motion for a directed verdict the moving party is required to convince the trial court that the evidence is insufficient, as a matter of law, to support a verdict in favor of the adverse party. Such motion may be based upon the ground that the plaintiff has not made out a *prima facie* case or that evidence introduced in support of a special defense has not been controverted by any evidence, direct or indirect, introduced by the adverse party. A motion for a directed verdict cannot be lawfully granted if there is any genuine issue as to any material fact in issue. The only difference between a motion for a directed verdict and a motion for a summary judgment is that the latter motion is made without introducing evidence before a court and jury and going through what may be the useless formality of a "trial." The evidence available to each of the parties is made known to the judge of the trial court. If upon a consideration of the oral and documentary evidence

available to each of the parties it appears to the judge of the trial court, without resolving or attempting to resolve conflicts, that viewing all of it in the light most favorable to the plaintiff there would not be sufficient substantial evidence to support a verdict in his favor the trial court is not only authorized but required to render a summary judgment.

At the time of the execution of the release by Garrett he and his former employer were legal strangers. This salient fact was overlooked by the Court. Under these circumstances the court-made presumptions against the validity of a release executed by a person who, *when he worked,* happened to make his living as a seaman and member of the crew of a vessel, were and are arbitrarily discriminatory since there is no reasonable, clear or direct relation between the presumptions and the mere fact of occupational status. They are, therefore, in contravention of the Fifth Amendment which prohibits all agencies of the federal government, including the judicial branch, from depriving any person of his or its property rights without due process of law.

The mere fact that the Supreme Court has stated the rule, without also determining that it possessed power under the Constitution to do so in the face of a contention that it did not, does not amount to a decision that such rule is constitutional. Therefore the question of constitutionality hereby raised by the appellee is open for decision by this Court. It is a very serious and important question and should be considered and decided upon a rehearing.

Appellee contends that the decision of the Supreme Court which, in effect, *arbitrarily* places *all* "seamen" in a *non sui juris* category is in direct conflict with the due process clause of the Fifth Amendment. No recognized concept of

the bases of "judicial notice" will support it. There is no statute enacted by the Congress which supports it. There is no reasonable or logical ground upon which to premise a rule placing all adult "seamen" in a presumptively *non sui juris* status and at the same time recognizing that if the *identical* persons happened to work for a railroad the ordinary rules with reference to the burden of proof of the alleged invalidity of a release will prevail. Consistency is not always recognized by courts as one of the rules which should be taken into consideration in rendering decisions but it is still a virtue.

The Congress has enacted remedial legislation for the benefit of employees of interstate common carriers by railroad. The Jones Act by reference thereto adopts certain of those statutes. Each of the statutes was enacted for the purpose of conferring substantial benefits upon the men who work in the respective railroad and maritime fields. The courts have held many times that each of these statutes must be *liberally* construed in favor of the workers. The Congress has placed *all* of these workers in the *same general category* with respect to their rights of action for damages and the defenses which the employer may urge. There is, therefore, no *reasonable* ground upon which to differentiate between them with reference to burden of proof of *any* issue which may be raised by the pleadings in an action based upon either of these statutes. Any attempt to unreasonably and arbitrarily discriminate in reference to the burden of proof in a controversy involving the validity of releases signed by railroad workers and maritime workers is prohibited by the "due process of law" clause, Fifth Amendment.

There is no reasonable ground upon which to differentiate between a release executed by First Doe, a seaman; Second

Doe, a railroad brakeman; Third Doe, a carpenter; Fourth Doe, a bricklayer; Fifth Doe, a plumber; and Sixth Doe, an electrician, for the *sole* reason that their occupations are in different industrial fields. Let us assume that First Doe and Second Doe are *identical* twins in all respects, mental and physical, excepting that one works upon a vessel and the other works in a railroad yard. Upon what basis, other than one which is purely fictitious, arbitrary and capricious, can we reach the result that a release executed by one is presumptively valid but presumptively invalid when executed by the other? If John Doe happened to work for a corporation which operated a railroad and ships and sustained two separate injuries, one while working on a flat car as a brakeman and another while working for the same employer as a seaman and member of the crew of a vessel on navigable waters and for a valuable consideration executed separate releases with respect to each claim for damages against his former employer would the former employer be in the status of trustee as to the second claim and in an "at arm's length" status as to the first claim? The negative answer is obvious. Any attempt to declare by judicial fiat that the mere fact of occupational status as a seaman is sufficient to put his former employer in the status of trustee or to put *every* seaman in the category of persons who are *non sui juris* is arbitrary, unreasonable and in contravention of the "due process of law" clause of the Fifth Amendment, Constitution of the United States. The *arbitrary* discrimination between persons *in similar circumstances* is a denial of "due process of law." (*Wallace v. Currin,* 95 F. 2d 856; affirmed, sub-nom. *Currin v. Wallace,* 306 U.S. 1, 83 L.ed. 441; *Bolling v. Sharpe,* 347 U.S. 497, 98 L.ed. 884.)

There are at least several maritime unions in the United States. The officers and members of these unions are "sea-

men." Are the collective bargaining agreements executed by such unions and the operators of ships presumptively invalid for the sole reason that the members of the union and the officers who negotiate the contracts for and on behalf of the members are "seamen"? During the negotiations leading up to the execution of such collective bargaining agreements it is obvious that a vast majority of the members of the various unions are actually employed as seamen on the vessels being operated by the various employers. Are all of these collective bargaining agreements presumptively invalid with respect to *such* members of the union for the sole reason that they are seamen *actually* employed as such during the negotiations preceding and at the time of the execution of such contracts?

A release is nothing but a contract. The same is true with reference to a collective bargaining agreement. If the sole fact of occupational status as seamen is sufficient in and of itself to raise all of the presumptions hereinabove referred to in a case involving the validity of a release then exactly the same presumptions must be applied to a dispute concerning the binding effect of a collective bargaining agreement. The *same* "burden of proof" rule which is *lawfully* applicable to a dispute over the validity of a release must be applied to a dispute over the validity of such collective bargaining agreement. If the rule of the Garrett case is applicable to contracts of release involving an ex-employer of a "seaman" it should be applied with more vigor to a collective bargaining agreement negotiated and executed while the employer-employee relationship is in actual existence. Are the ship-operating employers of this nation now justified in refusing to negotiate or contract with the seamen as a class because the law provides that they do so at their peril and that the contract will not be binding on the

seamen unless the employers are able to prove by affirmative evidence, whenever its validity is in issue, that none of the recognized grounds upon which contracts can be rescinded in equity is available to the seamen? The mere statement of the question seems to demonstrate how silly and ridiculous an affirmative answer would be.

The statutes of the United States require the master of every vessel about to engage in a foreign or intercoastal voyage to enter into a written contract with all members of the crew. Are these contracts (shipping articles) presumptively invalid and of no binding effect upon the various members of the crew merely because they are "seamen"? If a release is presumptively invalid because the seamen who execute them are "treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees" then the contracts consisting of the shipping articles are likewise presumptively invalid for the same reason. The Congress, by enacting the statutes prescribing the form and substance of the required shipping articles and permitting the addition of any other conditions not contrary to law, has certainly indicated that it was of the view that seamen as a class are in all respects legally competent to fully understand and enter into *binding* contracts with their employers through the masters of the various vessels involved.

If seamen as a class are competent to fully understand and enter into a presumptively valid contract of employment they are certainly competent as a class to enter into a presumptively valid contract of release.

Title 28, U. S. Code § 1861 provides, in part, as follows:

> "*Any* citizen of the United States who has attained the age of 21 years and resides within the judicial dis-

trict, *is* competent to serve as a grand or petit juror *unless:* * * *

(2) He is *unable to read, write, speak and understand* the English language.

(3) He is *incapable,* by reason of *mental or physical infirmities* to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." (Emphasis added.)

Section 198, California Code of Civil Procedure provides, in part, as follows:

"A person is competent to act as a juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. *In possession of his natural faculties and of ordinary intelligence and not decrepit;*

3. Possessed of sufficient knowledge of the English language." (Emphasis added.)

This Court will notice that neither the Congress of the United States, nor the legislature of the State of California were of the opinion that "as a matter of public policy", or for any other reason, seamen as a class are presumptively *non sui juris.* If such presumptive *non sui juris* status is so well recognized as to be a matter of common knowledge and therefore a subject of judicial notice without proof of the fact it would seem that the legislative bodies of the United States and of the State of California, should know about it and take notice of it by excepting all seamen from jury service. In fact the statutes of every State of the United States with reference to the qualifications of jurors could be quoted without finding in a single one of them any disqualification of seamen as a class.

Likewise there is nothing in the Constitution, the statutes enacted by the Congress, the constitutions of the various States or the statutes enacted by the legislative body of any State which gives the slightest indication that seamen as a class do not possess the qualification to hold *any* elective or appointive office which does not require special knowledge such a degree as a Doctor of Medicine or a degree as a Bachelor of Laws, etc. Jurors are required to read contracts, exhibits, and to be able to understand what negligence means upon being told that it is the doing of an act which an ordinarily prudent person would not do or the omission of an act which an ordinarily prudent person would do under the same or similar circumstances. They are required to have sufficient intelligence to understand the law applicable to a particular case upon hearing it read to them only once, when many lawyers are unable to understand it when they are given an opportunity to read it over and over again.

If a seaman happens to be called as a prospective juror in a United States District Court, and upon announcing the fact that his occupation is that of seaman, would any of the Judges of this Court, if sitting in a District Court, allow a challenge for cause upon the ground that there is a presumption raised by the rule announced by the United States Supreme Court that such seaman, merely because of his occupational status, is *non sui juris?* The mere statement of this question should be enough to illustrate the soundness of the contentions asserted by the petitioner in the instant case.

It is therefore respectfully contended that the "burden of proof" rule of the *Garrett* case is unqualifiedly and unquestionably unconstitutional.

Appellee was not required to argue the constitutionality of the *Garrett* case "burden of proof" rule in its brief be-

cause the appellant made no suggestion in his opening brief that the judicial power vested in the Supreme Court by the Constitution gave it the right to usurp the legislative power vested exclusively in the Congress by the same Constitution. Appellee was not attacking the judgment entered by the trial court and was entitled to assume that this Court would not, in its Opinion, introduce any controversial proposition of law, either substantive or procedural, or *sua sponte* premise a reversal in whole or in part upon any such court-erected premise.

The "court-made" burden of proof rule enunciated in the Garrett case is based upon a series of "court-made" presumptions. Reading the language of the Supreme Court literally it requires any person pleading a release executed by one whose occupational status was that of a seaman at the time of sustaining an injury to prove by affirmative evidence that the "seaman" executed the release with a *full* understanding of his *rights* and that *competent* medical and legal advice were and each thereof was available to the "seaman" at the very instant when he signed the release. Thus, in order to question the seaman as to *his* knowledge of his "rights", an *ex*-employer, is required, by this rule, to be a lawyer or at least know everything that a competent lawyer would know about the various matters underlying the bases of possible liability imposed by statute or the General Maritime Law upon the employer of a seaman; and the nature and limitations of defenses available to such employer. The *ex*-employer of such "seaman" pursuant to this "court-made" rule, would be required to prove by a preponderance of evidence that the "seaman" *fully* understood all of the ramifications of the Merchant Marine Act of 1920, Section 33, including *all* of the statutes of the United States modifying or extending that part of the Federal

Empoyers' Liability Act relating to personal injuries suffered by railroad employees (46 U.S.C. 688); and all of the bases of liability imposed upon the owner of a vessel for the benefit of a member of the crew thereof in the event such member of the crew suffered an injury in consequence of the unseaworthiness of the ship or a failure on the part of the owner thereof to supply and keep in order the proper appliances appurtenant to the ship; and that contributory negligence, in either event, is not a complete defense; and that assumption of risk is in neither event a defense at all; and that the "seaman" *fully* understood *all* of the elements of burden of proof, proximate cause, and measure of damages.[1] This places an intolerable, unreasonable and arbitrarily discriminatory burden upon the *ex*-employer of the "seaman". Inconceivable as it seems to be, the rule goes even further. It requires the employer to prove by a preponderance of evidence that the *nature* of the *legal* advice *available* to the seaman was of such caliber as to make it certain that the "seaman" at the *instant* he signed the release, had a *full* understanding of his legal rights and that the *nature* of the *medical* advice available to the "seaman" at the very instant he signed the release was such as to make it certain that he *fully* understood the nature and extent of his injuries. The ex-employer could not meet this part of the "rule" without showing that *at the time of signing* the release, the "seaman" had a competent lawyer and doctor at his side or at least available for telephone conferences. But this, astounding as it may appear, is not all! The "court-

1. This means that a corporate or individual ex-employer must violate the law which prohibits corporations from practicing law and which prohibits individuals from so doing unless duly licensed. Giving advice as to the law is "practicing law".

made" burden of proof rule also requires the ex-employer who has been stupid enough to make a settlement with a "seaman" in the first place, (and therefore should be tenderly treated, as a ward of the court) to prove by a preponderance of evidence to the satisfaction of a jury, that the *ex*-employer paid the "seaman" as a consideration for the execution of the release, a sum of money which the jury would consider to be an adequate (not merely reasonable) consideration therefor.

These "court-made" presumptions are in the general run of cases, for all *practical* purposes, incontrovertible. In the average case they erect an artificial and arbitrarily discriminatory barrier which deprives the ex-employer-defendant of a reasonable or fair opportunity to even *controvert* the presumptions.

This Court in the instant case, goes beyond the *Garrett* rule if that is possible. It says that the ex-employer cannot prevail as a matter of law, unless the seaman *admits* in his sworn testimony that a release is valid!

The "court-made" rule imposes the obligation upon the ex-employer to do more than merely controvert or evenly balance these artificial presumptions. In all litigation where the parties do not occupy a confidential relationship, the presumptions usually applicable are designated as *disputable* presumptions. In such cases the party against whom the disputable presumption is applied must offer evidence to controvert, not overcome, the presumption. If the disputable presumption is controverted by the adverse party the party upon whom the burden of proof is imposed must introduce other affirmative evidence, direct or indirect, sufficient to constitute a preponderance of evidence in favor of his contentions.

With reference to the presumptions introduced by the Supreme Court, the ex-employer must *affirmatively* prove the facts, contrary to the presumptions, by a preponderance of *direct* evidence.

Appellee respectfully submits that this "court-made" rule of "segregation" or "classification" is so arbitrarily discriminatory that it is incontrovertibly repugnant to the due process of law clause of the Fifth Amendment. It is also a violation of the constitutional right of every individual who happens to make his living as a seaman to enter into any contract which is not prohibited by or contrary to any public-policy statute enacted by the Congress or the legislative body of the particular state where the contract happens to be executed.

> "The rights of liberty, property, and the pursuit of happiness in which the individual is protected by the Constitution of the United States and of California apply as fully to his right to contract, untrammeled by unnecessary regulations, as they do to the freedom from arrest or restraint of person. * * * This liberty of contract, which includes contracts to work, contracts to employ, and liberty freely to make such contracts, means freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. But the power to restrict the right of private contract is strictly limited to police regulations in behalf of the public comfort, health, safety, morals, and welfare * * *. Nor does the legislature's power to impose reasonable regulations upon contracts subject to its jurisdiction include the right to impose such regulations as infringe upon the constitutional rights of the parties making the contracts." (11 Cal. Jur. 2d (Constitutional Law) § 198, pp. 601-602.)

Every ex-employer of a seaman is entitled to assume, if the seaman is *sui juris,* that such seaman has a constitu-

tional right to make a presumptively valid contract of release. If the ex-employer of a seaman is not entitled to rely upon that assumption then the constitutional right of the seamen in this respect will certainly be curtailed if ex-employers of seamen exercise ordinary common-sense under such circumstances. If the opinion of this Court is an enunciation of the actual rules of law applicable to compromises of *disputed* claims for damages asserted by "seamen" there will be an *abrupt* discontinuance of "settlements" if the ex-employers and their insurance underwriters use *ordinary common-sense,* and the courts will be flooded with *unnecesary* litigation. Is this what the Court intends to invite?

Ground Seven

An essential requisite of due process of law is that the Court which is to hear and determine a controversy *must be impartial.* Appellee disagrees and takes issue with the statement in the opinion that "no one disputes the premise that seamen are under the protection of the courts." *Every* litigant is entitled to the impartial disposition of litigated issues of fact and law. No litigant is entitled to the "protection of the courts" in the sense that any court may lawfully act in the conjunctive capacity of court and guardian. The courts have inadvertently created the basically fallacious fiction that seamen are "wards of the court" in cases where seamen were engaged in controversies with persons who *were* their employers at the time of the happening of accidents out of which subsequent claims for damages arose. The decisions use various phrases such as "wards of the admiralty" and "wards of the admiralty court", etc.

The Fifth Amendment, Constitution of the United States, provides that no person (and this includes a former em-

ployer of a seaman) shall be deprived of property without due process of law. If, in litigation between a seaman and a former employer, the court hearing and deciding any disputed questions of fact or law deems itself the *guardian* and the seaman its *ward,* the court could not be impartial. The temptation to favor the claims of the "ward" against those of a stranger and to give the ward the benefit of all doubts would effectively tend to deprive the stranger of a fair trial of issues of fact or law. For example, assume that John Doe is a duly appointed judge of the United States District Court. He is also, in his non-judicial capacity, the duly appointed guardian of Richard Roe, an "infant" of the age of twenty years and a seaman. There is no relationship of any kind between John Doe and Richard Roe excepting that of guardian and ward. If Richard Roe commenced an action for damages against a former employer under the Jones Act or the general maritime law is it not true that the guardian and ward relationship would preclude John Doe from hearing or adjudicating any issue of law or fact between the litigants? The only possible answer to this question is in the affirmative unless the employer knowingly waived the obvious disqualification. There is no compliance with the absolute right to due process of law unless the court hearing and deciding the issues of fact or *law* is *unqualifiedly* impartial. (*Inland Steel Co. v. Nat. Lab. Rel. Bd.,* 109 F. 2d 9; and *Nat. Lab. Rel. Bd. v. Ford Motor Co.,* 114 F. 2d 905; both Ninth Circuit decisions.) No group of human beings acting as a court can, with *certainty,* avoid being biased in favor of the contentions of one they regard as their ward. The testimony of the ward would naturally have more weight than that of a stranger and the ward's argument with reference to controversial questions of law would naturally be viewed as more sound than that of the

stranger. There should be an *abrupt and permanent destruction* of the *fiction* that seamen are *wards of the court.*

Therefore, *if* in the case at bar this Honorable Court has heard and decided the issues of law upon the premise that it was duty bound to protect the appellant as a guardian is bound to protect a ward, there has been a deprivation of the appellee-defendant's property right, consisting of the judgment, without due process of law.

Ground Eight

This Court has impliedly made objections, *nunc pro tunc,* as of March 8, 1954, and impliedly inserted these objections in the record on appeal; and predicated upon these *nunc pro tunc* objections, the Court has also *supplied* implied specifications of error setting out particularly the simulated "action of the Trial Court" in overruling the objections which were not made then but are inserted, *nunc pro tunc* at this time; and predicated upon all of the above fictitious foundation, this Court has reversed the judgment upon the following grounds:

1. The Trial Court erred in assuming that the evidence in the abortive trial was "live" for his consideration and that he was authorized to consider plaintiff-appellant's testimony, in the face of an objection made by the plaintiff-appellant in the trial court at the hearing of the motion for a summary judgment that the Trial Court had no such power. (Printed Opinion, top of page 4.) Appellant made no such objection in the Trial Court.

2. The Trial Court erred in rendering a summary judgment against a seaman (even though all of the evidence available to or within the cognizance of either of the parties up to the instant the motion for summary judgment was granted fails to show any genuine issue as to any material

fact relevant to the validity of a release or the ratification of a release) for the reason that if the motion were denied and a trial by jury were to take place the seaman may testify differently or correct the testimony given by him at the first trial, when questioned about it; there being, as a matter of law, no obligation upon a seaman to bring such matters to the attention of the Trial Court at any time during the hearing and consideration of a motion for a summary judgment. (Printed Opinion, pp. 6-7.)

The appellant made no objection *or suggestion* in the Trial Court which will support a ruling here that the trial court erred in failing to consider such *potential* issue of fact. (*Shafer v. Reo Motors, Inc.,* 205 Fed. 2d 685.)

3. The Trial Court erred in rendering a summary judgment against a seaman for the reason that the record on appeal does not indicate that the seaman ever *admitted* in his testimony that the release was valid. (Printed Opinion, p. 7.)

The appellant made no suggestion or statement in the Trial Court which will support this ruling; and it is respectfully contended that no precedent *can be found* or *cited* in support thereof. The surprising extent to which the Court has gone is illustrated by the following:

> "Neither the motion for a summary judgment, nor anything the court said, remotely indicated that the seaman ever *admitted* in his testimony that the release was valid." (Printed Opinion, p. 7.)

The attention of the Court is called to the following, taken from footnote 2, page 6, printed Opinion:

> "The Court: * * * I am taking the libelant's testimony at face value. I am taking his story as he told it, and as he told it I don't think he can avoid the release."

The Trial Court was speaking with particular reference to the *plaintiff's* testimony in the above quoted matter. It cannot be correctly stated that what the Trial Court said does not remotely indicate that the "seaman" ever *admitted* in his testimony that the release was valid. If it is true (and it cannot be presumed in the *absence of evidence to the contrary* that the trial judge, whose competency and integrity have been vouched for by a President of the United States and the Senate of the United States, was not giving an accurate resume of the plaintiff's testimony) that from the *plaintiff's* story, as *he* told it, the plaintiff cannot avoid the release, the remark of the Trial Court will certainly support an inference that the plaintiff's testimony showed, as a matter of law, that the only inference to be drawn therefrom was an *admission* that the release was valid.

With reference to the *motion* for a summary judgment, the Court overlooks the following, among the statement of reasons served and filed as a part of and in support of the motion:

> "* * * there is proof positive that Guerrero knew all of his rights set out in the paper (release) before he signed the release. * * * there can be no question but that the release is valid as a matter of law; that there is no question of fact to go to the jury; and that defendant, American-Hawaiian Steamship Company, a corporation, should have a summary judgment in its favor." (Tr. Rec. pp. 28-29.)

The plaintiff having failed to file a written or any statement in opposition to the defendant's statement of reasons in support of the motion, "such failure *shall* be deemed to constitute a *consent* * * * to the granting of said motion * * *." (Rules, United States District Court, Southern District California, Rule 3(d).) A *consent* to the granting of a

motion for a summary judgment certainly seems to *remotely* indicate that the "seaman" admitted that the release was valid. Why would he consent to the granting of the motion if the release was not valid?

The statement of the Court (Printed Opinion, p. 7.) that "there is no contention that appellant seaman admitted that the evidence established" "every essential to the validity of the release," is directly challenged by the appellee. That specific contention was asserted in the moving papers and in Point III of the "Brief for Appellee" it was contended that the appellant seaman had admitted that every essential to the validity of the release had been "proved" in the sense that by his silence, when denial was plainly called for, he authorized the Trial Court to assume that he admitted that there was no genuine issue of material fact relevant to the validity of the release.

4. The Court erred in that it "took the case to himself (*sic*) and found facts from evidence which had been presented in a former proceeding in a differently constituted Court." (Printed Opinion, bottom of page 8 and top of page 9.) Appellant made no objection in the Trial Court which will support this ruling.

5. The Trial Court erred in rendering a summary judgment for the reason that the moving papers in the summary proceedings show there were questions of fact at issue. (Printed Opinion, bottom of page 9.) Appellant made no objection or suggestion in the Trial Court or *here* which will support this ruling.

6. The summary judgment should be reversed because the record on appeal does not contain any transcript of the proceedings had before the jury was discharged. (P. 10, printed opinion.) This is attributable to the appellant; not to the appellee.

7. The Trial Court erred in that, contrary to the provisions of the Seventh Amendment, Constitution of the United States, it weighed conflicting evidence from which a jury could have rendered a verdict in favor of the plaintiff on the issues raised by the averments of the special defense to the effect that the plaintiff had excuted a valid and binding general release and the special defense premised upon the contention of the defendant that the plaintiff had ratified the release and decided, as a question of fact, that all of the testimony, and especially the testimony of the "seaman" constituted an admission of all of the elements necessary to the validity of the release, and said procedure was irregular and constituted clear error. (Printed Opinion, bottom of page 10.) The record on appeal does not support or justify this ruling.

8. The Trial Court erred in deciding, as a matter of law, that there was no genuine issue of material fact relevant to the contention of the appellee that the appellant had ratified the release by retaining the consideration received by him therefor and by not rescinding or offering to rescind said contract of release after he had available to him the professional advice of * * * David A. Fall. (Printed Opinion, page 11.)

None of these implied specifications of error is based upon any objection made in the trial court or asserted in the "Assignments of Errors" (Specifications of error) or the "Outline of Argument" (summary) preceding the argument which commences on page 8 of the opening "Brief for Appellee."

In the appellant's "Statement of the Case" he sets forth assertions as to alleged fact (p. 3, l. 16 to p. 4, l. 11.) but *he refers to no part of the record on appeal to substantiate these assertions.* Therefore, appellee believed that this

Court would ignore them in accordance with established precedent. In the remaining portion of the "Statement of the Case" he fails to contend that *there was a genuine issue of material fact* as to *any* matter which might affect the validity of the release or the ultimate decision with reference to the defense of ratification.

This Court must have had a very difficult task in preparing a written Opinion reversing the judgment in the absence of an opportunity to examine the evidence, oral and documentary, which was the basis of the ruling of the Trial Court *"that there is no genuine issue as to any material fact set forth hereinabove in these Findings of Fact."* (Tr. Rec. p. 52, ll. 8-9.) This ruling is exactly the same as though each "finding" from and including I to and including XIV were preceded by the following language: "There is no genuine issue as to any of the following material facts:" Appellee cannot understand how *this* Court can reverse the judgment upon the ground that the Trial Court committed error in so deciding, as a matter of law, when *this* Court cannot have the *slightest* actual knowledge from reading the "Transcript of Record" filed May 21, 1954, whether the evidence, oral and documentary, submitted to the Trial Court for its inspection and consideration does or does not support the action of Judge Westover.

Did the Court supply the additional specifications of error because of the premise which it assumed at the outset that "seamen are under the protection of the courts" to a preferential extent not accorded to other litigants?

In this respect the Court has also *amended* the opening brief of the appellant by its *sua sponte* action in raising points which were *not* raised in the opening brief or even preserved for review by any pertinent objection in the trial court proceedings. The appellant, in the trial court, did

not object to the *use* of the "transcript of the evidence" by the trial court for the purpose of determining, as a matter of law, whether there was a genuine issue of material fact relevant to the validity of the release. Appellant did *not* challenge the *power* of the trial court to *use and consider said "Transcript of the evidence" or the exhibits* which had been introduced and were part of the files and records of the case. Appellant's objection was directed to *an entirely different point.* It related *exclusively* to a mere *contention* that the testimony introduced at the time of the trial; and the exhibits on file and the "transcript of the evidence" contained *conflicting* evidence or that reasonable men might draw different inferences therefrom and that *therefore* there were substantial issues of material fact relevant to the validity of the release. Appellant did *not,* however, refer the trial Judge to *any* direct or indirect evidence (testimony of witnesses, documents marked as Exhibits or inferences which *could* be based thereon) which would indicate the existence of a genuine issue of material fact.

This Court cannot, without repudiating or ignoring its own rules, the Rules of Civil Procedure applicable to appeals, and the doctrine of *stare decisis* consider or decide whether genuine issues of material fact are shown in the evidence which both parties *conceded,* by not contending otherwise when ample opportunity was afforded to do so, was the only evidence which either of the parties knew anything about up to the time of the actual hearing of the motion for a summary judgment *without examining the same evidence* which was used and considered by the trial court. It isn't in the record on appeal. It was not the duty of the appellee to cause it to be brought up as a part of the record on appeal unless this Court is of the view that an arbitrarily discriminatory exception to the provisions of

Rule 75, Rules of Civil Procedure, which places the burden in that respect upon *every* appellant, is required in *every* case where the appellant happens to be a seaman; and that in such cases if the appellant does not furnish the appellate court with a complete record of what took place in the trial court it is the duty of the appellee to do so. Any such exception would be a clear violation of the due process of law clause of the Fifth Amendment.

This Court has overlooked the cardinal rule that it is an *appellate* Court and that its functions are *confined* to considering errors of law *committed* by the trial court and affirmatively appearing on the face of the record on appeal. Error is never *presumed.* All intendments, in the absence of an affirmative showing to the contrary, are in favor of the due and regular performance of the judicial acts of a trial court. In the matter quoted by the Court in footnote 2, there is *absolutely nothing* which supports the statement that the appellant ~~*denied that*~~ CONTENDED the trial court had no power and was not authorized *to use and consider* the matters and things which the trial court *did* consider in ruling on the motion.

This Court has also denied the appellee any opportunity whatever to be heard with respect to these alleged prejudicial errors which were impliedly asserted by this Court in the appellant's opening brief, as a part of the specifications of error. Is this fair?

Ground Nine

The appellee in its brief raised the following substantial questions of law:

> 1. "The fact that a formal issue as to the validity of the release was raised by operation of law did not entitle the appellant, *ipso facto,* to a trial by jury with reference to that proposition."

2. "Appellant's contention that Section 55 of Title 45, U. S. Code, is applicable to a release and settlement is invalid."

3. "The appellant has failed to comply with the rules of the United States District Court, Southern District of California."

4. "The appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration."

Appellee believes that this may be a very important issue of law in this case because of the fact that the Court has stated as follows:

> "But the moving papers in the summary proceedings show there were questions of fact at issue." (Printed Opinion, bottom of page 9.)

In the "Brief for Appellant" he makes a very strenuous argument addressed to the proposition that the allegations of the complaint were denied by the answer and that therefore, *ipso facto,* the "moving papers" showed that there were genuine issues of material fact which entitled the appellant to a jury trial. (Brief for Appellant, pp. 14A-18; p. 19.) It seems to appellee that this Court has embraced this novel theory; but it has no merit as the Court will see upon a reading of its own decision in the case of *Koepke v. Fontecchio,* 177 F.2d 125, 127.

If the Court, in making the statement referred to hereinabove, was confining itself literally to the "moving papers" then it had reference to the notice of motion and motion for a summary judgment, the memorandum of points and authorities in support thereof, and the proposed findings of fact, proposed conclusions of law and proposed summary judgment.

It is respectfully contended that an analysis of the "moving papers" will demonstrate that the Court is in error when it says *in effect* that the "moving papers" in the summary proceeding show there were genuine issues of *material* fact at issue, *relevant* to the validity of the release or the subject of ratification.

Because of the ambiguity and uncertainty resulting from the use of opaque language by the Court, without even a reference to the pages and lines of the "Transcript of Record" which might give a clue to the issues the Court had in mind, it is necessary to take pages to demonstrate by a process of elimination that the Court is in error. In the event this petition for a rehearing is denied, the appellee respectfully requests that the opinion be amended at the end of this statement with a reference to the pages and lines of the Transcript of Record which are believed by the Court to support this statement so that the time of the Supreme Court of the United States will not be unnecessarily consumed in following the appellee through a detailed process of elimination.

Appellee assumes that what the Court had in mind is the fact that the moving papers show on their face that there were disputed questions of fact and differences in opinion as to the amount of a settlement sum exhibited in the recitals of the negotiations leading up to the execution of the release. But the Court has failed to take cognizance of the proposition that: 1. The dispute between Guerrero and Holbrook with reference to the *identity* of the person who *wrote* the figures and items on the memorandum, (Tr. Rec. p. 27, l. 7 to p. 28, l. 22) did not raise any genuine issue of *material* fact relevant to the validity of the release or the subject of ratification. Let us assume that a jury had made express findings in the exact language of the find-

ings of fact signed by the Trial Judge. Let us also assume that a jury also made a specific finding that all of the items and figures were placed on the memorandum by Gus Oldenburg and that Holbrook had nothing whatever to do with writing anything thereon. Would such finding, in the face of the other express findings, support a verdict in favor of the plaintiff upon the ground that the *identity* of the person who wrote the items and figures on the memorandum, admittedly in the possession of the appellant for quite some time and obviously read and considered by him, had the slightest materiality or relevancy in determining the extent of the actual knowledge of the appellant in respect to the *contents* of the memorandum? The memorandum was relevant and material to one point only: was there any genuine issue of material fact relevant to the understanding of the appellant with reference to the extent of his "rights" in so far as the memorandum placed the elements thereof within the visual and perceptive powers of the appellant. The "dispute" between appellant and Holbrook was, as a matter of law, collateral, irrelevant and immaterial.

The fact that appellant telephoned to the San Francisco office of appellee and "expressed a *lack of confidence* in his attorney and informed the witness Slevin that he, Guerrero, *was consulting his own doctor*" (Tr. Rec. p. 28, ll. 23-26) would not support a finding that said attorney, whoever he was, was not competent or honest, or that competent legal advice was not *available* to appellant at the time he signed the release. The Court will take judicial notice, from its own roll of attorneys who were licensed to practice in the United States District Court, Southern District of California, that there were attorneys, counselors and *proctors in admiralty* in Los Angeles, Wilmington, San Pedro and Long Beach, California, from any one of whom appellant

could have procured any legal advice he might have needed. The fact that appellant *was* at the time of the telephone conversation, which was before the release was executed, *consulting his own doctor,* would not support a finding that competent medical advice was not available to him at the time he signed the release.

The fact that there was a disagreement between appellant and appellee with respect to the total amount which the appellant *asked* as a consideration for the execution of a release, either at the start of the negotiations which were *instituted* by the *appellant*—not the appellee—or during the course of the negotiations and the amount which the appellee was willing to pay would not support a finding that the appellee *executed* the release as a result of fraud or misrepresentation or mutual mistake of fact or as a result of deception or coercion or without a full understanding of his "rights". In every case involving a compromise of a disputed claim, in the negotiations leading to the ultimate meeting of the minds of persons *sui juris* as to the amount which one will accept and the other will pay as consideration for the execution of a release, there is at the start a "puffing" of the claim by the one asserting it and a "deflation" of the claim by the one contesting it. If this sort of difference is a genuine issue of material fact which would support a verdict that a release is void or even voidable, no trial court could in any case involving a defense premised upon a release grant a motion for a non-suit, summary judgment, directed verdict or judgment *non obstante veredicto.* In this respect, the appellant makes the fallacious contention that the mere fact that the jury in attendance at the mistrial disagreed demonstrates, *ipso facto,* that there were genuine issues of material fact relevant to the validity of the release. If that were so, no trial court could ever grant a motion

for a directed verdict or judgment *non obstante veredicto* after a jury had actually rendered a verdict. The contention of appellant, in this respect, is unadulterated sophistry.

If appellee has not yet ferreted out the matters which the Court had in mind in stating that the moving papers in the summary proceedings show there were questions of fact at issue, the only other matter or thing to which the Court could have been referring is the argument in the opening "Brief for Appellant" which points out that all of the material averments of the complaint were denied and that therefore the appellant, without further ado, was entitled as a matter of right to have the case tried by a jury. Appellee cited a decision of this Court to the contrary in its brief. The Court says nothing about that decision in the Opinion and in all probability overlooked it if it has embraced the theory of appellant with reference to the issues raised by the averments of the *complaint* which are denied in the answer. Not being a mind reader, appellee's counsel has been compelled to do the best he could by the process of elimination to discover what the Court was referring to. If the truth has not been discovered, will the Court please put the matter in plain words so that the trial court and appellee will know what the Court intended to refer to?

Appellee's contention that "the appellant has failed to comply with the Rules of the United States District Court, Southern District of California" has not been disposed of by any decision one way or the other on this point. It is clear from the Brief for Appellee, pages 22-27, that appellee raised the direct contentions that the appellant by his failure to serve and file any statement of reasons in opposition to those set forth in the appellee's Memorandum of Points and Authorities consented to the granting of the motion, and by his failure to serve and file a statement of genuine

issues, setting forth all material facts as to which it was contended there existed a genuine issue necessary to be litigated, the appellant, in effect, admitted the fact that there were no genuine issues of material fact with reference to the seventeen items printed on pages 23-26 of the Brief for Appellee.

This Court has not decided one way or the other whether the local rule is or is not valid or what the effect of a failure to comply therewith may be on a motion for a summary judgment. The Court's dissertation with respect to the fact that the rule does not *require* the Trial Court to assume that there is no genuine issue of material fact is beside the point. The record on appeal does not *affirmatively* show that the Trial Judge did *not* so assume.

The "Reporter's Transcript of Proceedings" which took place on March 8, 1954, shows no contention of any kind by plaintiff's attorney of the existence of any *evidence* (oral or documentary), competent, material, relevant or otherwise, upon which he claimed that any jury *could* make an express or implied finding that the plaintiff did not on the 26th day of August, 1949, duly make and execute a general release. Plaintiff's attorney did not call to the attention of the trial court any evidence (oral or documentary), which he claimed would support express or implied findings of a jury as follows: that the *execution* of the release was induced by any fraudulent representation made to the plaintiff; or that the plaintiff was fraudulently induced to believe that the money was not being paid to him as a release of any possible claim for damages he might have pursuant to the Jones Act; or that he was fraudulently induced to believe that he was merely signing a receipt or a release with referenec to possible claims which were entirely extraneous to any claim for damages proximately resulting from

bodily injury; or that the plaintiff was fraudulently induced to believe that his bodily injuries were ~~more~~ less serious than he believed them to be; or that there was any threat by the defendant to the effect that if the plaintiff did not execute a full and complete release the defendant would refuse to pay him the sum arising from contractual obligations and to which he was then entitled as a matter of right; or that unless he signed a general release the defendant would refuse to pay him the sum of $12.00 which he then had coming to him as maintenance; or that the release was not freely executed; or that the release was not executed by plaintiff with a full understanding of all of his rights; or that the nature of the medical or legal advice *available* to plaintiff at the time he signed the release was not reasonably adequate to aid him in his own understanding of his rights; or that the net sum of $1034.54 was so inadequate as to justify the inference that the plaintiff did not have a full understanding of his rights.

The fact that the allegations in the special defense of the defendant deemed denied by law and thus raised *formal* issues is not to be considered as raising genuine issues of material fact within the meaning of that language as it appears in Rule 56, F.R.C.P. "The court always looks beyond the pleadings and determines whether there is a genuine issue of material fact to be tried." (*Griffith v. Wm. Penn Broadcasting Co.,* 4 F.R.D. 475, 477. Cf. *Koepke v. Fontecchio* (9th Cir.) 177 F. 2d 125, 127.)

In *Griffith v. Wm. Penn Broadcasting Co.,* cited by this court in its opinion there is a pertinent and correct statement of the rule: "If the parties are unable to establish the existence of substantial competent evidence to support the allegations or denials thereby indicating a genuine issue of fact, the court may summarily determine the litigation on

the law. *Whitaker v. Coleman,* 5 Cir., 115 F.2d 205. But the presence of a real and material issue of fact precludes further consideration of the matter under this rule." (4 F.R.D. 475, 477.)

During the oral proceedings of March 8, 1954, appellant's attorney stated his personal conclusions, as follows:

1. The court is not entitled to decide from all of the facts presented to the jury that the release is valid and good. *That is a question of fact for the jury.*

2. In response to the statement by the trial court: "I have considered his testimony. I have taken his word for it. I am not deciding this upon the testimony of the respondent. I am deciding it upon the testimony of the libelant himself" appellant's attorney made the following statement: "You are going into a question of fact which is a fact that the jury must determine. This court does not have the power to determine a question of fact."

3. In response to the statement by the court: "*If* I were *resolving* the facts, if I were to disbelieve the libelant's testimony, then I would send it back to the jury. But I am taking the libelant's testimony at face value. I am taking *his* story as *he* told it, and *as he told it, I don't think he can avoid the release",* appellant's attorney made the following statement: "This court can't determine that. That is a question of fact for the jury." (Reporter's Transcript of Proceedings, March 8, 1954, p. 8, l. 9 to p. 10, l. 10.)

In this colloquy, appellant's attorney did not mention any evidence to which the court had referred or *any* evidence, oral or documentary, which the appellant could or would introduce, upon a trial before a jury in the event he had the opportunity to do so, which would present any genuine issue of material fact relating to any recognized basis upon which a jury *could* determine that the release was *void* or even merely voidable.

The mere fact that appellant's attorney expressed his contention that the validity of the release was a question of fact for the jury does not amount to an affirmative showing that the trial court was not fully justified in determining, as a matter of law, that there were no genuine issues of material fact pursuant to which a jury might lawfully find that the release was void or voidable.

Appellant's attorney did not assert a contention to the effect that a jury would be lawfully entitled to find, upon the basis of any competent evidence already adduced or which could thereafter have been adduced at a trial, that the release was void *ab initio*.

The clear distinction between a release or any other contract which is void *ab initio* and one which is merely *voidable* is apparently not recognized by appellant's attorney. The distinction was inadvertently overlooked by this Court. With specific reference to the release involved in the instant case, if by reason of a fraudulent misrepresentation or concealment of the contents of the written release pursuant to which a claim for damages under the Jones Act was specifically released, the appellant had been fraudulently led to believe that the entire consideration, whatever it was, was being paid to him on account of claims entirely extraneous to any claim for damages by reason of bodily injuries, then and only then would he be entitled to contend that the release, insofar as its literal terms wiped out a claim under the Jones Act, was void *ab initio;* and he would not, if he could convince a jury that his version was correct, be required to restore or offer to restore the consideration or any part thereof as a condition precedent to filing or maintaining an action for damages premised upon the Jones Act. However, in such case, the rule of law actually applicable would not permit any court to authorize a jury to make a finding that

the release was not void *ab initio,* and was only voidable, and thereupon render a verdict in any particular sum for damages and merely deduct therefrom the amount of the consideration which had been paid therefor. Under such circumstances, if the jury found that the release was not void *ab initio* but was merely voidable, the general verdict of the jury would have to be in favor of the defendant; unless the appellee had refused to agree to a rescission upon an offer of the appellant to do so and the jury determined that the appellant was entitled to prevail on the question of rescission. If a jury found that appellant was entitled to prevail on an issue of rescission *then,* and only then, could it render a general verdict for appellant and give credit for the amount already paid.

There is no room for controversy with reference to this principle of law. No adult person who was *sui juris* at the time of executing a *voidable* release is entitled to have any jury consider his claim for damages or to render a verdict in his favor unless he restores or offers to restore the consideration which was paid to him. He cannot blow hot and cold. He cannot claim that a release was the result of a mutual mistake of fact, for example, thereby contending that neither of the parties to the release intended to make the contract which they did make and at the same time keep the money which was paid to him by one of the parties as the sole proximate result of such mutual mistake of fact. The thoroughly established rules of restitution inhibit any such inequitable proposition.

This Court has reversed the summary judgment. In doing so it inadvertently committed the grievous error of assuming that there was a genuine issue of material fact with reference to a claim asserted by the appellant and denied by the appellee that the release was void *ab initio.*

Ground Ten

On page 28 of the "BRIEF FOR APPELLEE" appellee directly raised the following contention: "THE APPELLANT *RATIFIED* THE CONTRACT OF RELEASE BY RETAINING THE CONSIDERATION AND FAILING TO RETURN OR OFFER TO RETURN ANY PART OR PORTION OF THE CONSIDERATION." Appellee also contended, on page 30 of the "BRIEF FOR APPELLEE" as follows: "Under the foregoing circumstances it is clear that *the appellant elected to stand upon the contract. He cannot stand upon it and repudiate it at the same time.*"

Appellee cited and quoted from a "JONES ACT" case in which a longshoreman, held by the United States Court of Appeals to be a *"seaman"* within the meaning of that word as it appears in the "Jones Act", had executed a release which, literally construed, covered the claim for damages asserted in Court by said "seaman". The Court of Appeals *held* that the *only* reason the doctrine of ratification was not applicable to his conduct was that he claimed and proved to the satisfaction of the trier of fact that "there was a *fraud* in *creating* the *written* memorial of (a contract to settle a claim for lost wages *only,* for the sum of $300.00) in inducing him to *execute a paper whose contents were misrepresented to him.*" The United States Court of Appeals said:

> "He can annul this paper for *that* reason without abandoning the *real* contract, and without returning the $300 *if* it was really paid to him *to settle his lost time* as he says, and *not* for his signature to the paper, or *for a general settlement. This* was a question of fact." (Emphasis added.)
>
> *Panama Agencies Co. v. Franco,* 111 F.2d 263, 266.

This Court disposes of the foregoing contentions of appellee by an inadvertent usurpation of the legislative powers

of the Congress or of the legislature of the state of California (the State in which the contract of release was executed); whichever of these two legislative bodies is vested with power to enact a statute restricting the defenses available to an ex-employer of a "seaman" in an action for damages against the ex-employer by reason of bodily injuries. The opinion of this Court is in clear and direct conflict with that of the United States Court of Appeals, in *Panama Agencies Co. v. Franco, supra,* even though this Court has apparently chosen to say nothing about it *in the opinion* in the instant case. It is also in clear and direct conflict with the decision of the United States Supreme Court in *Callen v. Pennsylvania R. Co.,* 332 U.S. 625, 92 L.ed. 242 which holds that in *all* actions for damages predicated upon the Federal Employers' Liability Act (said F.E.L.A. being a part of the Jones Act by reference thereto) the doctrine of ratification *is* applicable.

No court is vested with power to create public policy. This Court has no such power. Its power is strictly statutory and is confined, in the instant case, exclusively to the exercise of *appellate* jurisdiction for the sole purpose of correcting errors of law which are shown *affirmatively* on the face of the *actual* record on appeal to have been committed by the trial court.

The creation of an arbitrarily discriminatory exception to any established substantive or procedural rule of law is in excess of the statutory judicial power vested in this Court by the Congress pursuant to its *exclusive* constitutional power to do so; and it is also in clear contravention of the due process of law clause, Fifth Amendment.

This Court summarily disposes of the contentions of appellee based upon the established principles of ratification by the statement, as follows: "The doctrine is good as to

certain *commercial* transactions, but has no application to the instant case." (Emphasis added.) The Court cites two cases in support of this novel and fundamentally unsound declaration.

In *Garrett v. Moore-McCormack Co., Inc.,* 1942, 317 U.S. 239, there is nothing said about whether the doctrine of ratification of a *voidable* release is or is not applicable to a man who makes his living as a seaman.

> "For a prior decision to control a subsequent case, the first requirement is of course that the prior decision be in point, that is, that it shall have been decided on substantially the same facts, and that *the issues presented* by the *later* case shall have been *raised, considered* and *determined* in the former one.
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> * * *
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> "It is a fundamental qualification of the doctrine of stare decisis that the authority of a decision is limited to the points therein actually involved and actually decided. Thus, such authority does not extend to what may be said in the opinion aside from or in addition to the decided points. Neither does it extend to any legal proposition which on the facts of the case *might* have been but *was not raised or decided.* And an opinion that does not consider questions pertinent to the instant case cannot be relied on as a precedent, though the questions may be said to 'lurk' in the court's decision." (Emphasis added.) (13 Cal. Jur. 2d 660-663.)

Please also see:

Pacific S.S. Co. v. Peterson, 278 U.S. 130, 136; 72 L.ed. 220, 223.

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, where correc-

tion depends upon amendment and not upon legislative action this court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is *particularly* true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the constitution to extract the principle itself. Here we are applying, contrary to the recent decision in Grovey v. Townsend, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled." (Emphasis added.)

Smith v. Allwright, 321 U.S. 649, 665-666; 88 L.Ed. 987, 998.

This Court does not point out in any clear language why it is of the opinion that the United States Supreme Court *decided* in the *Garrett* case that the doctrine of ratification is in no case applicable to a person whose occupational status is that of "seaman". Sometimes, thoughts are concealed rather than revealed by the language used. Appellee is entitled to assume and contend and does assume and contend that what this Court has obscured with the vagueness of its language and has not put in direct and concise language is this: the *Garrett* decision is *stare decisis* upon the proposition that *every* seaman is *presumptively non sui juris* at the time he *executed* a release of a claim for damages arising from a claimed maritime tort and has remained in a *presumptively non sui juris status* from the time he "executed" a release up to and including the time when the ex-employer is able to prove by a preponderance of evidence that he was not in a *non sui juris* status at or during any of the intervening time; and that therefore the

release in the case at bar was and is *presumptively void* and the appellant because of his presumptively *non sui juris* status was under a recognized disability similar to that of an incompetent person and for *that* reason excused from the ordinary obligation imposed upon persons *sui juris* to elect whether to rescind a voidable contract of release or ratify and confirm it.

In any event this Court has by clear implication enunciated that such is the rule governing the decision of the Court on the ratification issue in the case at bar. Appellee directly and vigorously asserts that the introduction of such an exception to the general principles of ratification is condemned by common sense, the ordinary traditions and ideals of fairness; and is in contravention of the due process of law clause of the Fifth Amendment. It is a clear and arbitrary discrimination in favor of the appellant and against the appellee, without the slightest evidence in the record on appeal to support it.

Pursuant to the "equal protection of the laws" clause of the Fourteenth Amendment (not in *all* cases binding on the federal courts) no state legislature would be permitted to create any such arbitrarily discriminatory exception to the general rules of ratification. The United States Supreme Court would unhesitatingly strike it down. All seamen are born of women like the rest of us. They all go to the same type of schools and learn to read and write. The mere label of "seamen" does not make an ordinarily intelligent man a dunce, a nit-wit, or *ipso facto* and automatically a credulous individual apt to be imposed upon by artful and designing persons; and all ex-employers of "seamen" are not *ipso facto* artful and designing persons. The relationship between a ship-operator and a seaman when the seaman is actually a member of the crew of a vessel operated by his

employer is *not* a *confidential or fiduciary relation.* It does not come within any of the definitions of a confidential or fiduciary relationship. (Please see: Words & Phrases, Annotated.) It is, in any event, a legal certainty that *after* the employer-employee relationship has ceased to exist they deal with each other with reference to the execution of contracts upon the same bases as they deal with other persons who stand in the relation of "legal-stranger" to them.

No one would resent the implications of the *non sui juris* fiction more than the seamen themselves. Is it this Court's considered opinion that all of the cargo and passenger-carrying vessels of the United States Merchant Marine are manned by persons so utterly lacking in perspicacity or inherent intelligence that they would not, as a class or category, be competent to sit as jurors in the trial of action for damages for personal injuries; or that they do not have normal powers of perception which would enable them to read and understand the plain and unambiguous language of a simple release? If so, how do they understand their "rights" and duties as provided for in the "not too simple" language of "Shipping Articles", which an act of the Congress *requires* them to execute? *All* men aboard a vessel and aiding in her navigation are seamen within the meaning of that word as it is used in the Jones Act. Are the masters, mates and licensed engine room personnel all included in the rules introduced by the United States Supreme Court in the *Garrett* case and by this Court in the instant case? If not, where is the line of segregation, *inter sese,* drawn?

CONCLUSION

It is respectfully contended that the various federal courts which have created or accepted the "premise" that "modern-day" seamen are entitled to "the protection of the

courts" have done so inadvertently. *Perhaps* the various courts and judges did this because they were concentrating their attention exclusively upon the over-powering rays of a fallacious "spotlight" which drilled into the ordinarily impartial judicial minds the false premise that all seamen are presumptively *non sui juris.*

If this is so, then the courts have been victims of self-hypnosis and have mesmerized themselves to the extent that they have, in effect, eradicated and discarded all of the thoroughly established substantive and adjective law, under the common-law and equity jurisprudence, relevant to a defense premised upon the admitted execution of a release by *any* adult person in the *full* possession of *normal faculties of perception.*

The Congress, by statute enacted many years ago, provided that "each justice or judge of the United States shall take the following oath or affirmation before performing duties of his office: I, ..., do solemnly swear (or affirm) that I will administer justice *without respect to persons,* and do *equal* right to the poor and to the rich, and that I will faithfully and *impartially* discharge and perform *all* the duties incumbent upon me as ..... according to the best of my abilities and understanding, *agreeably* to the *Constitution* and *laws of the United States.* So help me God." (In the present form: Tit. 28, U.S. Code, § 453.) (Emphasis added.)

The Constitution provides:

> "*All* legislative Powers herein granted *shall* be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. (Article 1, Section 1. Emphasis added.)
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> * * *
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> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts

and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

"To borrow Money on the credit of the United States;

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

"To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

"To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

"To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

"To establish Post Offices and post Roads;

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

"To constitute Tribunals inferior to the supreme Court;

"To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

"To provide and maintain a Navy;

"To make Rules for the Government and Regulations of the land and naval Forces;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as

may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Section 8, Article 1.)

* * *

"The powers *not delegated to the United States by the Constitution, nor prohibited by it to the States,* are reserved to the States respectively, or to the people." (Amendment X; emphasis added.)

Article III, Sections 1 and 2, of the Constitution provides as follows:

"SECTION 1. The *judicial* Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

"SECTION 2. The *judicial* Power shall extend to all Cases, in Law and Equity, arising under this Constitu-

tion, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In *all* the *other* Cases before mentioned, the supreme Court shall have *appellate* Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis added.)

The fact that the *judicial* power of the United States Supreme Court vested in the Supreme Court extends "to all Cases of admiralty and maritime Jurisdiction" does not authorize that Court to add to, subtract from, modify or extend the substantive or adjective "admiralty and maritime Jurisdiction" *as it existed at the time of the ratification of the Constitution.* These subjects are within the *exclusive* legislative power of the Congress, pursuant to *its* right "To make *all* Laws which shall be *necessary and proper* for *carrying into Execution* the foregoing Powers, and all *other* Powers vested by this Constitution in the Government of the United States, or in *any* Department or Officer thereof." (Last sentence, Article 1, Section 8, Constitution of the United States; emphasis added.)

In the case of *Garrett v. Moore-McCormack,* 317 U.S. 239, 87 L.ed. 239, the Supreme Court not only referred to the decision written by Justice Story sitting on Circuit in 1823, in the case of *Harden v. Gordon,* 2 Mason 541, Federal Case No. 6047, 11 Federal cases 480, but quoted therefrom. (This Honorable Court has also cited the same case at the bottom of the first paragraph on page 11, printed Opinion.)

The strange thing about the whole business is that the Supreme Court did not quote from or refer to the part of Justice Story's Opinion which was specifically applicable to the subject of burden of proof in cases involving releases signed by a seaman. The part of the Opinion quoted by the Supreme Court had reference to matter which had been inserted, *in handwriting,* in a printed form of a contract of employment, which most of the witnesses contended was not on the document at the time it was signed by the seamen.

In a subsequent part of the same Opinion, when Justice Story got down to brass tacks on the subject of releases, this is what the Court said:

> "In every view, which the court has been able to take of the point now under consideration, the respondents have failed to establish, that they were not originally liable for the charges of sickness claimed by the libellant. But it is insisted, in the last place, that the claim, whatever might have been its original validity, has been completely adjusted and settled by the parties. And a receipt, given by the libellant, is relied upon as satisfactory proof of the fact. In respect to instruments of this nature, however general and comprehensive their terms may be, there is no pretence to say, that they have a binding *and conclusive* effect. The most, that can be attributed to them, is, that *they afford prima facie evidence of all, that they purport to declare,* and *that they are to stand, until overthrown by counter proof from the other party.* They do not arrogate the

high prerogatives, which the common law has attributed to releases under seal; and even these may be *set aside in equity,* when *surprise, fraud, mistake,* or *undue influence have intervened to the material injury of the party.* It need hardly be said, that *courts of admiralty* in the administration of their duties, *seek to follow the general principles of justice, rather than technical rules, and consequently avail themselves more of doctrines founded in* general *equity,* than in the inflexible strictness of the common law. They have not the rashness to impute blame to the latter, for they are not insensible of its excellence. But they understand, that the common law does not affect to apply remedies to all cases of injustice; and leaves to other courts the full right to pursue a more enlarged equity, whenever their constitution enables them to favour and support it. When a receipt is given in full of all demands, it is not to be taken in the admiralty as *conclusive.* It is *open to explanation,* and upon *satisfactory* evidence may be restrained in its operation. *But the natural presumption is in its favour,* and *that* presumption will *prevail, until it is displaced by direct proof or strong circumstances. Indeed* in cases of doubtful or conflicting claims, where a compromise takes place, and receipts are given, as final discharges between the parties, upon deliberate consideration and in good faith, *there is the greatest reason to uphold these instruments, for they tend to general repose and security.* But when there has been no such compromise; when there has been an entire mistake of right, or an unobserved comprehensiveness in the language, reaching beyond the matters under settlement, there would be gross injustice in refusing the injured party an equitable relief. These observations apply to general receipts. But when, as in the present case, the receipt is merely annexed to the foot of an account, and admits the payment of the balance only, it is to be viewed merely as a stated account, and confined in its opera-

tion to the items, which are specified. It cannot by any ingenuity be made to reach other claims which it neither recognises nor repudiates. Now a stated account is liable to be impeached; and in a fit case the party is admitted to surcharge and falsify it. If errors and mistakes are apparent on the face of it, or the party comes with a strong case, recenti facto, courts dealing in equities are in the constant habit of affording relief. And, what presses with more force on the present occasion, there are situations of peculiar influence and confidence between the parties, in which the opening of settled accounts is very reluctantly refused, and very easily permitted. But it is not necessary to examine this matter very minutely, because, in the case before the court, there is no settlement of any claim, except that of wages and an inconsiderable item for medicines. The other items are not even mentioned in the account; and it is signed with an express exception of errors. It therefore concludes nothing, and is now open to correction as to the item of medicines, for which, upon the principles already stated, the libellant is not liable. As a receipt, or as a stated account, it presents no bar whatsoever to the controverted claims; and if a final settlement of these claims is to be established upon evidence aliunde, that evidence has not as yet been produced. On the other hand, such a settlement is utterly denied by the oath of the libellant, and that oath is supported by the exception of errors on the settled account. This point of defence may then be dismissed without farther comment, as sustained neither de facto, nor de jure."

Harden v. Gordon et al., 11 Fed. Cas. 480, 487-488. (Emphasis added.)

The federal courts, from the United States Supreme Court down to the United States District Court, could not have modified or extended the common-law rights or

remedies available to railway employees. It required an act of the Congress to do this. The United States Supreme Court decided that the Congress was vested with legislative power to do this *solely* because of its *exclusive* right "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *". All that the federal courts have is "*judicial* Power". They possess *no legislative power* whatever. Creating, modifying, extending or repealing *any* law, substantive or adjective, applicable to the *exercise* of "judicial Powers" vested in the federal courts by the Constitution, is the exclusive function of the Congress.

Whether or not the Congress would have any legislative power to enact a statute controlling the right of two or more persons to execute a contract depends entirely upon the subject matter of the contract. If the subject matter does not involve any matter which is subject to regulation or control by the Congress in the exercise of the powers specifically vested in it by the Constitution, then exclusive legislative powers with respect thereto are reserved to the States, or to the people. Therefore the question of burden of proof to show the validity or invalidity of a release executed by a person whose occupational status is that of "seaman" is a matter which is subject to exclusive control of the state where the contract was executed.

The *judicial* power of the United States Supreme Court extends "to all Cases of admiralty and maritime Jurisdiction" *but* the Constitution also plainly provides that with respect thereto "the *supreme* Court shall have *appellate* jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make." (Article III, second paragraph of Section 2, Constitution of the United States; emphasis added.)

Expressio unius est exclusio alterius.

Therefore, the United States Supreme Court has never been vested with lawful power to *create* any substantive law or any exception thereto with respect to the subject-matter of releases executed by seamen or any other person. Neither has *this* Court. The Congress has authoritatively legislated with respect to the alteration and modification of the general maritime substantive law, as it existed prior to June 5, 1920, by enacting the Jones Act on that date and thereby creating a new *statutory* cause of action for the benefit of seamen suffering personal injuries in the course of their employment (*Pacific S. S. Co. v. Peterson,* 278 U.S. 134, 73 L.Ed. 222). It is not within the lawful power of *any* court to introduce any amendment thereto by the *unauthorized* exercise of *judicial* power.

The instant the Judges constituting the division of the United States Court of Appeals for the Ninth Circuit to whom this controversy was assigned for hearing and judgment inadvertently embraced (*if* they did) the concept that they were in duty bound to protect and defend the appellant against the appellee, they disqualified themselves; and for this reason alone the judgment is null and void. Appellee had no notice, actual or constructive, that this ground of disqualification existed until the Opinion was filed. It was, therefore, not waived and is not now waived by addressing this petition for rehearing to said Judges. Appellee-petitioner has done so merely because the rules promulgated by the Judges of this Court *require* that a petition for a rehearing be so addressed.

It is conceded, as it must be, that whenever a defendant pleads *any* separate and special defense the burden is imposed upon the defendant to prove the facts constituting the defense by a preponderance of all of the evidence introduced upon issues raised by the pleadings in that respect.

This does not mean, however, that the seaman may remain mute and require the defendant to offer *affirmative* evidence in the first instance to prove that the seaman freely executed the release, that the *execution* thereof was not induced by fraud or mutual mistake, or that there was no deception or coercion, or that it was executed by the seaman with a full understanding of his rights, or that it was supported by an adequate consideration. All the releasee is required to do in order to make out a *prima facie* defense is to show that an adult seaman *did* execute the release and did at the time actually receive a consideration therefor in the form of lawful money of the United States. Well established disputable presumptions supply the remaining elements which will sustain the validity of the release and constitute *prima facie* proof thereof. The seaman is then required to offer affirmative evidence of sufficient substance to *controvert* the *prima facie* defense. If he does not, the defendant has proved the facts involved in the separate and special defense by a preponderance of the evidence. If the seaman *controverts* the *prima facie* defense by affirmative evidence, *then* the defendant must go forward with additional affirmative evidence in order to prove the ultimate fact by a preponderance of the evidence.

Therefore, the burden of proof rule is no different in a case involving a release executed by a seaman than that applied in respect of all other releases pleaded as separate and special defenses. Furthermore, when the facts of the *Garrett* case are *kept in mind,* the Supreme Court in all probability did not intend to hold otherwise. Garrett, in his testimony, *did* controvert the *prima facie* showing of the validity of the release involved in that case. At least a jury *could* have so found. The appellant here has not pointed to anything contained in the record on appeal which shows that

he *could* have controverted the *prima facie* validity of the release he executed.

Upon all of the grounds, argument and authorities hereinabove set forth, the appellee American-Hawaiian Steamship Company, a corporation, contends that it is entitled to a rehearing and that the petition therefor should be granted.

San Francisco, California
May 13, 1955

Respectfully submitted,

LASHER B. GALLAGHER
Attorney for American-Hawaiian Steamship Company, a corporation.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

LASHER B. GALLAGHER

(Appendix follows)

APPENDIX

ACT EMPOWERING THE SUPREME COURT OF THE UNITED STATES TO PRESCRIBE RULES

THE ACT OF JUNE 19, 1934, CH. 651

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651 Sections 1, 2 (48 Stat. 1064).]

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cogni-

zable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. As amended Dec. 29, 1948, effective Oct. 20, 1949.

RULE 2. ONE FORM OF ACTION

There shall be one form of action to be known as "civil action".

* * * * * * *

RULE 6. TIME

* * * * * * *

(d) *For Motions—Affidavits.* A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

III. PLEADINGS AND MOTIONS

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

* * * * * * *

(b) *Motions and Other Papers.* (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

RULE 9. PLEADING SPECIAL MATTERS

* * * * * * *

(g) *Special Damage.* When items of special damage are claimed, they shall be specifically stated.

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

* * * * * * *

(b) *How Presented.* * * * (6) failure to state a claim upon which relief can be granted, * * *

(c) *Motion for Judgment on the Pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

* * * * * * *

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

* * * * * * *

(b) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that no partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a). As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.

(c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

V. DEPOSITIONS AND DISCOVERY

Rule 26. Depositions Pending Action

(a) *When Depositions May Be Taken.* Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * * * *

(d) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of

evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

* * * * * * *

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

* * * * * * *

(e) *Objections to Admissibility.* Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. As amended Dec. 27, 1946, effective March 19, 1948.

RULE 32. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

* * * * * * *

(c) *As to Taking of Deposition*

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

* * * * * * *

(d) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 43. EVIDENCE

(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open courts, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to

which reference is herein made. The competency of a witness to testify shall be determined in like manner.

* * * * * * *

(e) *Evidence on Motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

RULE 46. EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 56. SUMMARY JUDGMENT

* * * * * * *

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

RULE 61. HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 75. RECORD ON APPEAL TO A COURT OF APPEALS

(a) *Designation of Contents of Record on Appeal.* Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record,

proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

* * * * * * *

(d) *Statement of Points.* No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * * * *

(g) *Record to be Prepared by Clerk—Necessary Parts.* The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict of the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk

may not require an additional copy as a requisite to certification. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(h) *Power of Court to Correct or Modify Record.* It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(i) *Order as to Original Papers or Exhibits.* Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * * * *

(o) *Rule for Transmission of Original Papers.* Whenever a court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district

court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73(g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies. As amended Dec. 29, 1948, effective Oct. 20, 1949.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RULE 17. PRINTING RECORDS.

* * * * * * *

3. In all cases, the clerk of this court shall prepare the record for the printer, index the same, supervise the printing, and distribute the printed copies to the judges and one or more printed copies to the counsel for the respective parties.

RULE 18. BRIEFS.

* * * * * * *

2. This brief shall contain, in order here stated—

* * * * * * *

(c) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(d) In all cases a specification of errors relied upon which shall be numbered and shall set out seperately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found.

RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

"RULE 3. MOTIONS AND MATTERS OTHER THAN TRIALS ON THE MERITS.

"(a) Motion Days:

"Mondays, while the court is in session, shall be "Motion Days" on which all calendars will be called and on which all motions, and demurrers where permitted, orders to show cause, and matters other than trials on the merits will be heard unless set for a particular day by order of the court. When notice to the adverse party is required to be given, such notice shall be for a Monday unless the court, for good cause shown, shall direct otherwise. If Monday be a national holiday, the succeeding Tuesday shall be the motion day for that week and all matters noted for such Monday shall stand for hearing on Tuesday without special order or notice.

"(b) Time for Hearing:

"When there has been an adverse appearance, a written notice of motion, or of hearing on a demurrer where per-

mitted, shall be necessary, unless otherwise provided by rule or court order.

"Any notice shall be served upon the adverse party, or his attorney, at least ten days before the time appointed for the hearing, unless the court or one of the judges thereof shall, for good cause by special order, prescribe a shorter time, and such notice shall be filed with the clerk not later than five o'clock P.M. on the Tuesday immediately preceding the Monday appointed for the hearing by the notice of motion. All motions or other matters belonging upon the Motion Day calendar, if so filed, shall be placed by the clerk upon the calendar for hearing upon the following Monday. Unless otherwise specially ordered, the clerk shall refuse to file any notice of motion, presented for filing, which sets a matter for hearing other than as above provided.

"(c) Motions Submitted:

"Motions, in general, shall be submitted and determined upon the motion papers herein referred to. Except in the event of a motion to retax costs under Rule 15(c) hereof, oral arguments shall be permitted only upon application and proper showing to the judge presiding at the hearing.

"(d) Requirements for Submission:

"There shall be served and filed with the notice of motion or other application and as a part thereof, (A) copies of all photographs and documentary evidence which the moving party intends to submit in support of the motion or other application in addition to the affidavits required or permitted by Rule 6(d) F.R.C.P., and (B) a brief, but complete, written statement of all reasons in support thereof, together with a memorandum of the points and authorities upon which the moving party will rely. Each party opposing the motion or other application shall (A), within five days after service of the notice thereof upon him, serve and file a brief, but complete, written statement of all reasons in opposition

thereto and an answering memorandum of points and authorities, or a written statement that he will not oppose said motion, and (B) not later than one day before the hearing, serve and file copies of all photographs and documentary evidence upon which he intends to rely.

"If the moving party so desires, he may, within two days after the service upon him of the points and authorities of the adverse party, file a reply memorandum.

"Any party either proposing or opposing a motion or other application who does not intend to urge or oppose the same or who intends to move for a continuance, shall immediately notify (1) opposing counsel, (2) the clerk, and (3) the secretary of the judge before whom the matter is pending, in order that the court and counsel may not be required to devote time to an immediate consideration of a matter which will not be presented.

"Failure by the moving party to file any instruments or memorandum of points and authorities provided to be filed under this rule, shall be deemed a waiver by the moving party of the pleading or motion. In the event an adverse party fails to file the instruments and memorandum of points and authorities provided to be filed under this rule, such failure shall be deemed to constitute a consent to the sustaining of said pleading or the granting of said motion or other application.

"(d)(2), Motions for Summary Judgment:

"There shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

"Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

"In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except and as to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion. * * *"

(Rules of the United States District Court for the Southern District of California)

The following definitions are quoted from

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Protection: "1. Act of protecting; state or fact of being protected; as, the protection of the weak; to provide protection from harm. 2. A protecting person or things; as, the Lord is our protection; dark glasses are a protection from the sun. * * * 4. Government, oversight, or support of a protector or patron; as, small nations under British protection, * * * **Syn.**—Preservation, guard, security, safety."

Preservation: "1. Act or process of preserving, or keeping from injury or decay; state of being preserved; as preservation of life, fruit, game, etc.; a picture in good preservation. * * * 2. *Obs.* a A preservative; a safeguard. b Something preserved. **Syn.**—Safekeeping, conservation, saving. * * *"

Guard: (*verb*) "* * * 2. To protect from danger; to defend; shield; * * * 5. To furnish with proper checks or corrections; to safeguard; * * * **Syn.** Protect * * * See DEFEND."

Guard: (*noun*) "* * * **3.** Hence, state of being, or act of holding, in ward; protection, defense, as a nation's welfare is in the guard of its citizens; also, state or act of holding ward, or watch against danger; as, to keep guard. * * * **5.** One who or that which guards against injury, danger, or attack; * * * **6.** A man or body of men stationed to protect or control a person or position, a watch; a sentinel; specif., a soldier or sailor, or a number of them, on guard duty. * * *."

Security: "* * * **1.** The quality or condition of being secure. Specif.: **a** The condition of being protected or not exposed to danger; safety; also, a place of safety, * * * **b** Freedom from fear, anxiety, or care, a feeling or, formerly, an unfounded assumption, that one is secure; as, to rest in false security. * * * **c** Freedom from uncertainty or doubt; confidence, esp. well-grounded confidence; assurance. * * * **2.** That which secures. Specif.: **a** A means of protection, defense, etc.; a guard; as, to provide a security from invasion. **b** A guarantee of safety, adequate protection, certainty, etc.; a ground for believing oneself or something safe or secure. * * * **3.** *Law.* **a** Something given, deposited, or pledged, to make secure, or certain, the fulfillment of an obligation, the payment of a debt, etc.; property given or serving to render secure the enjoyment or enforcement of a right; surety; pledge; * * * **b** One who becomes surety for another, or engages himself for the performance of another's obligation; a surety. * * * **Syn.** Protection, defense, guard, shelter; guarantee."

Safety. "**1.** Condition or state of being safe; freedom from danger or hazard; exemption from hurt, injury, or loss; as, a committee of safety. **2.** *Obs.* **a** Redemption; salvation. **b** Custody. **c** A means of protection; a safeguard. **d** Act of saving; deliverance. **3.** Quality or state of being devoid of whatever exposes one to danger or harm; safeness; hence, the quality of giving confidence, justifying trust, etc.; de-

pendableness. * * * **5.** Preservation from escape; close custody. * * * **6.** A keeping of oneself or others safe, esp. from danger of accident or disease; as, safety education.

Protect: "To cover or shield from that which would injure, destroy, or detrimentally affect (or from a physical or chemical effect); to secure or preserve against attack, encroachment, harm, disintegration, etc.; to defend; to guard; as, to protect oneself, one's children, or one's eyes from glare; to protect iron from erosion, a state from its enemies, or a patent from infringement. * * * **4.** *Eng. Hist.* To act as protector for. * * * **Syn.**—Shield, preserve. See DEFEND. * * *"

Defend: "* * * **1.** To ward or fend off; to drive back or away; to repel. * * * **3.** To repel danger or harm from; to protect; to secure against attack; to maintain against force or argument; to uphold; guard; * * * to defend the absent;—sometimes with from or against; as, to defend oneself from, or against, one's enemies. **4.** Of a lawyer, to act on behalf of (an accused person). **5.** *Law.* To deny or oppose the right of the plaintiff in regard to (the suit, or the wrong charged); to controvert; to oppose or resist, as a claim at law; to contest, as a suit.—*Intransitive:* To make a defense; to fight in defense; *Law,* to enter or make a defense in an action or suit. **Syn.**—Shield, shelter, screen, secure, watch, save. * * * —DEFEND, PROTECT, GUARD, PRESERVE. * * *"